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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

VIVIANO WINE IMPORTERS, INC.

Petitioner,

v.

BROWN-FORMAN CORPORATION,
D/B/A BROWN-FORMAN BEVERAGE
COMPANY, WINE DIVISION,

Respondent,

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in an action removed pursuant to diversity jurisdiction, involving the interpretation of a Michigan statute which was enacted pursuant to the State's authority under the XXIst Amendment to regulate the distribution of wine products within its borders and which has never been interpreted by a Michigan court, the Court of Appeals improperly avoided the directive of the Supreme Court in Salve Regina College v. Russell, 499 U.S. 225, 111 S. Ct. 1217, 113 L. Ed.2d 190 (1991), that federal appellate courts must conduct de novo review of district court determinations of state law, rather than defer to the district court's interpretation, by construing the operative terms of the statute as involving questions of fact subject to the "clearly erroneous" standard of review, rather than questions of law or mixed questions of law and fact subject to de novo review.

2. Whether the Court of Appeals improperly failed to conduct de novo review of the trial court's grant of summary judgment to the Respondent regarding two elements of the statute with respect to which the Respondent had the burden of proof.

LIST OF PARTIES

The Petitioner is Viviano Wine Importers, Inc., a corporation which has no parent companies. The Respondent is Brown-Forman Corporation. The parties to the proceedings before the Sixth Circuit Court of Appeals and the United States District Court for the Eastern District of Michigan, Southern Division, were limited to Viviano Wine Importers, Inc., and Brown-Forman Corporation.

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Petitioner, Viviano Wine Importers, Inc., petitions as follows for a Writ of Certiorari to review the July 10, 1996 Opinion of the United States Court of Appeals for the Sixth Circuit which affirmed the Judgment entered by the United States District Court for the Eastern District of Michigan, Southern Division, on June 23, 1994.

OPINIONS BELOW

The Judgment of the United States District Court for the Eastern District of Michigan, Southern Division, entered on June 23, 1994, and the Opinion of the United States Court of Appeals for the Sixth Circuit entered on July 10, 1996, are not published.

JURISDICTION

This Petition seeks review of an Opinion entered by the United States Court of Appeals for the Sixth Circuit on July 10, 1996. A Petition For Rehearing And Suggestion For Rehearing En Banc filed by Petitioner, Viviano Wine Importers, Inc., on July 24, 1996, was denied by the United States Court of Appeals for the Sixth Circuit on August 20, 1996.

Viviano Wine Importers, Inc., seeks to invoke the jurisdiction of the Supreme Court to review the Opinion of the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. §1254(1)(1994), which provides:

> Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. XXI, §2 is relevant to this case and states:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

One federal statute involved in this review is 28 U.S.C. §1332(a)(1)(1994), which provides:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between -
>
> (1) citizens of different States;

A second federal statute involved in this review is 28 U.S.C. §1652 (1994), which provides:

> The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in civil actions, in the courts of the United States, in cases where they apply.

The state statute involved in this review is Michigan P.A. 1984, No. 159, §1, M.C.L. §436.30a-c; M.S.A. §18.1001(1)-(3). A copy of the statute is attached as Appendix D.

STATEMENT OF THE CASE

This Petition deals with the appropriate standard of review to be applied by a United States Court of Appeals reviewing a United States District Court's interpretation of a state statute in a diversity case, in particular, a state statute which regulates the sale and distribution of alcoholic beverages within the State under the express authority granted the State by U.S. Const. amend. XXI, §2. The statute in question is the Michigan Wine Franchise Act ("Wine Act" or "Act"), M.C.L. §436.30c; M.S.A. §18.1001(3), which was enacted by the Michigan legislature in 1984 in conjunction with a parallel statute dealing with beer franchises, M.C.L. §436.30b; M.S.A. §18.1001(2).

This is a case of first impression. There are no decisions by any Michigan court interpreting the Wine Act. One of the principal purposes of the Wine Act, according to the unrebutted testimony of one of Petitioner's experts who was instrumental in drafting the statute and participated in the legislative hearings leading to its passage, is to prevent the arbitrary termination of Michigan wine wholesalers (also called "distributors") by their wine suppliers. (Foresman, Joint Appendix, Vol. VIII, 4348-53)[1]

Petitioner Viviano Wine Importers ("Viviano") filed this action in state court challenging its termination as a distributor of Korbel Champagne ("Korbel") by Respondent Brown-Forman Corporation ("Brown-Forman"). The case was removed from state court pursuant to diversity jurisdiction under 28 U.S.C. §1332(a)(1)(1994).

Viviano claimed at trial and on appeal that its termination as a distributor of Korbel by its supplier, Brown-Forman, violated the Wine Act. Viviano maintains that the trial court,

[1] All record citations are to the applicable volume and page(s) of the Joint Appendix.

trying the case without a jury, improperly applied the Wine Act's provisions which require that the supplier, who has the burden of proof under the Act, demonstrate that its termination of a wholesaler was for good cause, that it acted in good faith, and that it complied with the notice requirements of the Act.

On appeal, the Court of Appeals construed these issues as questions of fact, requiring that Viviano demonstrate that the District Court's determinations were clearly erroneous. Petitioner submits that these issues were either questions of law, or mixed questions of law and fact, which the Supreme Court has held are subject to de novo review, and that by construing these matters as questions of fact the Court of Appeals avoided the de novo review which the Supreme Court declared in Salve Regina College v. Russell, 499 U.S. 225, 111 S. Ct. 1217, 113 L. Ed.2d 190 (1991), appellate courts must engage in when reviewing a district court's determination of state law.

Viviano was originally appointed as a Korbel distributor in 1969 and until 1984 was the exclusive statewide distributor. At the time of Viviano's appointment, up to the date of its termination in August, 1992, Brown-Forman was aware that Viviano, which specialized in distributing fine wines, was not calling on, and given the nature of its operation could not call on, every retail account in the State every year in an effort to sell the products in its portfolio.

In 1984, Brown-Forman appointed a second Korbel distributor, Van Hollenbeck. Although Viviano was apprised of this appointment by Brown-Forman, Viviano was not apprised that Van Hollenbeck was also being given a statewide distributorship. In 1985, pursuant to the requirements of the newly enacted Wine Act, Viviano and Brown-Forman executed a contract which required Viviano to use its "best efforts" to sell, distribute, and promote

Korbel. (A copy of the contract is attached as Appendix E.)[2]

In 1987 and thereafter, Brown-Forman appointed an additional nineteen Korbel distributors throughout the State, with territories consisting of one or more counties. In 1987 Van Hollenbeck sold its statewide Korbel distributor rights to another distributor, J. Lewis Cooper ("Cooper"). Viviano, which distributed its products directly, repeatedly complained to Brown-Forman that Cooper was using a network of sub-distributors to sell Korbel statewide and was directly distributing Korbel only in the Detroit metropolitan area. Brown-Forman conceded at trial that Cooper's use of sub-distributors was unauthorized under ¶15 of their contract, which was identical to Viviano's contract.

By the end of 1987, there were at least two authorized Korbel distributors in 79 of Michigan's 83 counties, plus either Cooper or one or more of its unauthorized sub-distributors. The record reflects that this proliferation of Korbel distributors by Brown-Forman increased competition to cut-throat levels and precipitated price wars among its

[2] The trial court found that "in mid-1984, defendant designated other wholesalers as Korbel distributors" and that when Viviano executed the 1985 contract, Viviano "was aware that there were other Korbel distributors in the State ... ." (Judgment, p. 4) Viviano disputed these findings as clearly erroneous, given that the unrebutted testimony by Viviano's President was that there was only one other Korbel distributor when he executed the contract (Van Hollenbeck), that he was unaware that it had been given a statewide territory (Viviano, Vol. IX, 4985-88, 4993-94, 5159-61), and that the testimony of Brown-Forman's Area Manager, also unrebutted, was that he appointed all of the other Korbel distributors in 1987 and thereafter (Rocco, Vol. VIII, 4429-47; Ex. 167, Vol. IV, 1932-35). The Court of Appeals nonetheless affirmed these findings without discussing the basis for them. (Opinion, p. 2)

distributors.

In 1989, a revised contract signed by Brown-Forman's Vice President was sent to Viviano. (Ex. 112, Vol. IV, 1834-39) The contract deleted the liquidated damages provision contained in the 1985 contract which Viviano had objected to as violating the Wine Act. The revision also changed the "best efforts" language to a requirement that Viviano use "all reasonable efforts" to sell, distribute, and promote Korbel. When Viviano notified the Vice President that the contract omitted Viviano's statewide territory, the Vice President promised to send a corrected version. No revision was ever sent.

On February 26, 1992, Brown-Forman sent Viviano a letter indicating its "intent to terminate" Viviano as a Korbel distributor and imposing a Performance Improvement Plan ("PIP"). (Ex. 6, Vol. III, 1427-36) An essentially identical letter was sent to Cooper. (Ex. 25, Vol. III, 1614-23). Equivalent letters were sent to two other distributors which distributed Brown-Forman products other than Korbel. None of the nineteen non-statewide Korbel distributors were threatened with termination.

In a subsequent exchange of letters, Viviano objected that the February 26th letter did not constitute proper notice under the Act because it did not specify how Viviano allegedly had violated its contract and requested clarification of the alleged breach and of the requirements under the PIP. In its responses, Brown-Forman refused to clarify the basis for the termination or answer Viviano's questions regarding the PIP. On August 14, 1992, Brown-Forman sent Viviano a letter terminating its Korbel distributorship, stating, "The reasons for termination shall include but may not be limited to your company's ability to service all accounts within your contracted area of responsibility." (Ex. 22, Vol. III, 1605)

Simultaneous with Viviano's termination, Cooper executed a new contract limiting its territory to the Detroit metropolitan area. It canceled its contracts with its sub-distributors around the State and was not terminated. Nor were any of the other non-statewide distributors. As a result of these actions, Brown-Forman succeeded in eliminating all multiple Korbel distributorships within every territory in the State, thereby rendering every Korbel distributor exclusive within its territory.

It is undisputed that although each of the twenty other Korbel distributors were subject to the same contract terms as Viviano, none of them were calling on all of the retail establishments within their respective territories, the alleged basis set forth in the August 14th letter for Viviano's termination. At trial, however, Brown-Forman maintained that Viviano was terminated not for failing to "service all accounts" in its statewide territory, as stated in the letter of termination, but for failing to call on all "potential Korbel purchasers," which Brown-Forman conveniently equated to all of the accounts the other Korbel distributors were calling on in the State - irrespective of whether they sold any Korbel to those accounts, rather than other wine products in their portfolios.

It is also undisputed that at the time of its termination Viviano, in a declining national market, was buying and selling more Korbel **than all of the twenty other Michigan Korbel distributors combined**. (Ex.'s 236, 237, and 238 A & B, Vol. IV, 2223-34) Its market share at the time of its termination was 54.3%. (Ex. 356 D & E, Vol. IV, 2985-86) The evidence further indicated that Viviano was calling on 4,000 retail establishments in Michigan (Ex. 152, Vol. IV, 1898) and was selling product to 2,903 of those accounts (Ex. 14, Vol. III, 1474-1521), many of which were the same accounts called on by the other distributors. Brown-Forman nonetheless claimed that Viviano had breached its contract to

use its "best efforts" to sell Korbel by not calling on **all** of the 13,468 retailers that cumulatively the twenty other Korbel distributors represented they were calling on in Market Profiles (Ex. 467, Vol. VI, 3233-69) that they submitted to Brown-Forman, even though the evidence showed that year after year most of these distributors were selling little if any Korbel to those retailers. (Ex.'s 238 A & B, Vol. IV, 2231-34)[3]

ARGUMENT

I. THE COURT OF APPEALS APPLIED THE ERRONEOUS STANDARD OF REVIEW WITH RESPECT TO THE DISTRICT COURT'S INTERPRETATION OF THE PROVISIONS OF THE WINE ACT IN THE CONTEXT OF THE FACTS OF THIS CASE.

The relevant provisions of the Wine Act which govern the termination of a wholesaler are §§30c(7)-(9), and §30c(14). Under §30c(9), the supplier has the burden of proving that it had good cause for terminating the wholesaler, that it complied with the notice requirements, and that it acted in good faith, as defined in §30c(1)(d). Under §30c(1)(d), the Wine Act adopts the definition of "good faith" that applies between merchants under the Michigan Uniform Commercial Code, M.C.L. §440.2103(b); M.S.A. 19.2103(b), i.e., "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." Under §30c(14), a distributor is required to "devote reasonable efforts and resources to sales and distribution" of the supplier's product.

In order to prove that it had good cause for the termina-

[3] Viviano's challenges to the admissibility, relevance, and accuracy of the Market Profiles, given that none of the distributors who prepared them testified at trial, were rejected at trial and on appeal.

tion, under §30c(8) the supplier must prove **all** of the following: (1) that the wholesaler failed to comply with a provision of their agreement; (2) that the provision was both reasonable and of material significance to the business relationship; (3) that the supplier first acquired knowledge of the alleged failure not more than two years before it gave notice of termination; (4) that the supplier gave the wholesaler a valid written notice of noncompliance; and (5) that it afforded the wholesaler a reasonable opportunity after issuing the notice of noncompliance to assert good faith efforts to cure the alleged noncompliance prior to issuing the notice of termination.

Viviano maintained at trial and on appeal that Brown-Forman failed to carry its burden of proof that it had good cause for terminating Viviano, that it acted in good faith, that it complied with the notice requirements, and that it had not waived its objection to the alleged breach under §30c(8)(b)'s two-year restriction. The Court of Appeals held on page 3 of its decision that Michigan law construes "questions of good faith, reasonableness, good cause, and notice as factual determinations to be made by the trier of fact." As such, the Court indicated that it reviews "a trier of fact's factual determinations for clear error, but review[s] the district court's interpretation of the Act - a question of law - de novo." Applying this standard, the Court concluded that the trial court's determinations on these issues were not clearly erroneous.

Viviano submits that by construing the operative statutory factors as factual determinations subject to the clearly erroneous standard of review, the Court of Appeals applied the wrong standard and that its decision is contrary to several decisions of the Supreme Court, is contrary to a long line of decisions by the Sixth Circuit and other circuits, and is contrary to similar decisions by Michigan's courts, all of which indicate that issues of statutory interpretation and mixed questions of law and fact are subject to de novo review.

Since most wine suppliers are not Michigan residents, Michigan courts are unlikely to have the opportunity to interpret the Wine Act absent certification by a federal court. Given the plenary authority granted the states under the XXIst Amendment to regulate the distribution of alcoholic beverages within their borders, the federal judiciary should be particularly sensitive to a state's interests in enforcing its legislative enactments regulating that industry. See, e.g., North Dakota v. United States, 495 U.S. 423, 110 S. Ct. 1986, 109 L. Ed.2d 420 (1990)("[W]ithin the area of its jurisdiction, the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." 495 U.S. at 431.).

The core issue in this litigation is whether good cause for termination exists under the Wine Act where a distributor, operating in a multiple distributor market, is purchasing and selling more of the supplier's product than any other distributor, and more than the twenty other distributors combined, on the alleged basis that its contract - executed before most of the other distributors were even appointed - required it to call on all of the same retailers that the other distributors were calling on, even though the evidence indicates that the other distributors were unable to sell the supplier's product to those retailers. This is an issue of no small significance for Michigan jurisprudence and for the State's enforcement of the Wine Act. It goes to the heart of the Wine Act's principal purpose of preventing the arbitrary termination of wholesalers. To treat this as no more than a question of fact, as the Court of Appeals did, does a disservice to the Michigan legislature.

In Salve Regina College v. Russell, 499 U.S. 225, 111 S. Ct. 1217, 113 L. Ed.2d 190 (1991), the Supreme Court rejected the view that courts of appeal may defer to the federal district court's determination of the law of the state in which the district court sits. The Supreme Court stated, 499

U.S. at 231-32:

> We conclude that a court of appeals should review de novo a district court's determination of state law. As a general matter, of course, the courts of appeal are vested with plenary appellate authority over final decisions of district courts. ... The obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations.
>
> Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration. District judges preside alone over fast-paced trials: Of necessity they devote much of their energy and resources to hearing witnesses and reviewing evidence. Similarly, the logistical burdens of trial advocacy limit the extent to which trial counsel is able to supplement the district judge's legal research with memoranda and briefs. Thus, trial judges often must resolve complicated legal questions without benefit of "extended reflection [or] extensive information." ...
>
> Courts of appeals, on the other hand, are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues. As questions of law become the focus of appellate review, it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge. Perhaps most important, courts of appeals employ multijudge panels ... that permit reflective dialogue and collective judgment. (Citations

omitted.)

The Court elaborated further, id. at 234:

> **The twin aims of the Erie doctrine - "discouragement of forum-shopping and avoidance of inequitable administration of the laws," ... - are components of the goal of doctrinal coherence advanced by independent appellate review.** As respondent has conceded, deferential appellate review invites divergent development of state law among the federal trial courts even within a single State. ... Moreover, by denying a litigant access to meaningful review of state-law claims, appellate courts that defer to the district courts' state-law determinations create a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum. (Emphasis added; citations omitted.)

Summing up, the Court declared, id. at 238, "When de novo review is compelled, no form of appellate deference is acceptable." This leaves open the question whether the issues raised in this appeal relating to good cause, good faith, reasonableness, notice, and waiver, constitute questions of law or questions of fact. The obvious cannot be ignored, however, that at the core of this litigation is a state statute in which these are the principal operative terms. It would appear ineluctable, therefore, that the construction of these terms in a given factual context entails questions of law or, at least, mixed questions of law and fact, rather than simply questions of fact.

The Supreme Court has recognized in a number of decisions that mixed questions of law and fact frequently cross the line into the realm of legal issues subject to de novo review. The Court thus stated in Bose Corp. v. Consumers

Union of U.S., Inc., 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed.2d 502 (1984), 466 U.S. at 501:

> Rule 52(a) applies to findings of fact, including those described as "ultimate facts" because they may determine the outcome of litigation. ... **But Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.** ... Nor does Rule 52(a) "furnish particular guidance with respect to distinguishing law from fact." ... What we have characterized as "the vexing nature" of that distinction ... does not, however, diminish its importance, or the importance of the principles that require the distinction to be drawn in certain cases.[17]
>
> [17] A finding of fact in some cases is inseparable from the principles through which it was deduced. **At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment.** Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes - in terms of impact on future cases and future conduct - are too great to entrust them finally to the judgment of the trier of fact. (Emphasis added; citations omitted.)

The Supreme Court similarly observed in Baumgartner v. United States, 322 U.S. 665, 64 S. Ct. 1240, 88 L. Ed. 1525 (1943), 322 U.S. at 670-71:

> The phrase "finding of fact" may be a summary characterization of complicated factors of varying significance for judgment. Such a "finding of fact" may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print. The conclusiveness of a "finding of fact" depends on the nature of the materials on which the finding is based. The finding even of a so-called "subsidiary fact" may be a more or less difficult process varying according to the simplicity or subtlety of the type of "fact" in controversy. **Finding so-called ultimate "facts" more clearly implies the application of standards of law. And so the "finding of fact" even if made by two courts may go beyond the determination that should not be set aside here.** Though labeled "finding of fact,"it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of "fact" that precludes consideration by this Court. (Emphasis added.)

See also Pullman-Standard v. Swint, 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed.2d 66 (1982)("That question [whether differential impact of the seniority system reflected an intent to discriminate on account of race], as we see it, is a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard. It is not a question of law and not a mixed question of law and fact." 356 U.S. at 287-88.); United States v. General Motors Corp., 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed.2d 415 (1966)("[T]he ultimate conclusion by the trial judge, that the defendants' conduct did not constitute a combination or conspiracy in violation of the Sherman Act, is not to be shielded by the 'clearly erroneous' test embodied in

Rule 52(a) of the Federal Rules of Civil Procedure." 384 U.S. at 141, note 16.); United States v. Singer Mfg. Co., 374 U.S. 174, 83 S. Ct. 1773, 10 L. Ed.2d 823 (1963)("[W]e reject, as a question of law, the court's inference that the attitude of suspicion, wariness and self-preservation of the parties negated a conspiracy." 374 U.S. at 193.); National Labor Relations Board v. Hearst Publications, 322 U.S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (1943) ("Undoubtedly, questions of statutory interpretation ... are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute." 322 U.S. at 130-31.); Helvering v. Tex-Penn Oil Co., 300 U.S. 481, 57 S. Ct. 569, 81 L. Ed. 755 (1936)("The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board." 300 U.S. at 491.).

The holding of the Court of Appeals that the construction of the Wine Act in the factual context of this case presented issues of fact subject to the "clearly erroneous" standard likewise runs counter to a series of decisions by the Sixth Circuit that have held that statutory construction in a given factual context involves mixed questions of law and fact that are subject to de novo review. With respect to the particular issue of whether Brown-Forman provided the notices of noncompliance and termination that are required by the Act, for example, the Sixth Circuit stated unequivocally in K & M Joint Venture v. Smith International, Inc., 669 F.2d 1106, 1111-12 (6th Cir. 1982), that such a question presents a mixed question of law and fact that must be reviewed de novo:

> We agree that the question of whether any notice was given, and if so, what the notice consisted of and

when it was given, is one of fact. **However, the question of whether the notice satisfied the statutory requirement is one of law. Thus, the issue of notice in this case presents a mixed question of fact and law. In reviewing mixed findings we are not bound by the clearly erroneous standard.** This was clearly stated in United States v. Weingarden, 473 F.2d 454, 460-61 (6th Cir. 1973):

> In our opinion, the finding by the District Court that the sole purpose of the issuance of the summons is for criminal prosecution, is not a finding of fact. It is either a mixed finding of fact and conclusion of law, or it is a finding of the ultimate fact in the making of which is involved legal principles. **It is subject to appellate review, and the clearly erroneous rule has no application.**
>
> In Cordovan Associates, Inc. v. Dayton Rubber Co., 290 F.2d 858, 860 (6th Cir. 1961), we held:
>
> "Where a finding designated as a finding of fact is not in reality a finding of fact, but is a conclusion of law or a mixed finding of fact and conclusion of law, it is not binding on the appellate court. ... **Where a finding is of an ultimate fact in the making of which is involved the application of legal principles, it is subject to review.** Baumgartner v. United States, 322 U.S. 665, 64 S. Ct. 1240, 88 L. Ed. 1525." (Emphasis added; some citations omitted.)

The Court reaffirmed its holding in K & M Joint Venture in Taylor and Gaskin v. Chris-Craft Industries, 732 F.2d 1273 (6th Cir. 1984), wherein the Court, interpreting the application of the consequential damages provision of Michigan's Uniform Commercial Code, stated, id. at 1277:

> This court may review de novo findings of ultimate facts which result from the application of legal principles to subsidiary factual determinations; moreover, conclusions of law are excluded from the clearly erroneous standard of Rule 52(a), and are therefore also subject to the de novo review of this court. ... The dispositive issue of this appeal is the propriety of the district court's conclusion that the foregoing facts failed to establish a proper case for the award of consequential damages under the applicable state statutes. **The trial court arrived at its conclusion by the application of the statutory law to the facts of the case, accordingly, the district court's holding was a conclusion of law which is "subject to appellate review, and the clearly erroneous rule has no application".** K & M Joint Venture v. Smith Int'l, Inc., ... (Emphasis added; citations omitted.)

The Court again reaffirmed this holding in Waxman v. Luna, 881 F.2d 237 (6th Cir. 1989), declaring, id. at 240:

> In Taylor and Gaskin, Inc. v. Chris-Craft Industries ..., we set forth the applicable standards of review of a trial court's findings. We explained that factual findings must be upheld unless clearly erroneous; however, we review de novo "findings of ultimate facts which result from the application of legal principles to subsidiary factual determinations." ... Conclusions of law are also subject to de novo review. Therefore, **whenever the trial court arrives at its conclusion by application of statutory law to the facts, such holding becomes a conclusion of law reviewable under the de novo standard.** Id. In the case before us, the district court has applied ERISA statutory law to the facts of the case, and, therefore, we will undertake a de novo review of the district court's conclusions of law. (Emphasis added.)

See also Inland Waters Pollution Control, Inc. v. National Union Fire Insurance Co., 997 F.2d 172, 175 (6th Cir. 1993) (applying Michigan law); Richards v. General Motors Corp., 991 F.2d 1227, 1234 (6th Cir. 1993)(applying Michigan law); Dynamic Heating & Pumping Co. v. Insurance Co. of North America, 912 F.2d 123, 125 (6th Cir. 1990)(applying Michigan statute).

Virtually every federal circuit has held that questions of statutory interpretation and/or mixed questions of law and fact are subject to de novo review. See, e.g., Hammond v. T. J. Litle & Co., Inc., 82 F.3d 1166, 1174 (1st Cir. 1996)(applying Mass. law); Scribner v. Summers, 84 F.3d 554, 557 (2d Cir. 1996)(applying N.Y. law); Travellers Intern., A.G. v. Trans World Airlines, Inc., 41 F.3d 1570, 1575 (2d Cir. 1994)(applying N.Y. law); Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988)(applying federal statute); Michael v. Shiley, Inc., 46 F.3d 1316, 1322 (3d Cir. 1995)(applying Pa. law); Staff Builders of Philadelphia, Inc. v. Koschitzki, 989 F.2d 692, 694 (3d Cir. 1993)(applying Pa. statute); Gilbane Bldg. Co. v. Federal Reserve Bank of Richmond, 80 F.3d 895, 902 (4th Cir. 1996)(applying N.C. statute); Resolution Trust Corp. v. U.S. Fidelity and Guar. Co., 27 F.3d 122, 125 (5th Cir. 1994)(applying La. law); Farmers-Merchants Bank and Trust Co. v. CIT Group/Equipment Financing, Inc., 888 F.2d 1524, 1526 (5th Cir. 1989)(applying La. statute); Cincinnati Ins. Co. v. Flanders Elec. Motor Service, Inc., 40 F.3d 146, 150 (7th Cir. 1994)(applying Ind. law); Kaplon v. Howmedica, Inc., 83 F.3d 263, 266 (8th Cir. 1996)(applying Ark. statute); Doe v. Wright, 82 F.3d 265, 269 (8th Cir. 1996)(applying Ark. law); City Nat. Bank of Fort Smith, Ark. v. Unique Structures, Inc., 49 F.3d 1330, 1333 (8th Cir. 1995)(applying Ark. statute)("In Arkansas, whether the sales were commercially reasonable is a question of fact. ... We review such findings of fact for clear error. ... To the extent the district court was required to interpret state law in defining a 'commercially

reasonable' sale, however, we review the court's interpretation de novo giving no deference to the district court. ..." Id.; citations omitted.); Cooper Tire & Rubber Co. v. St. Paul Fire and Marine Ins. Co., 48 F.3d 365, 369 (8th Cir. 1995)(applying federal statute), cert. denied, 116 S. Ct. 300, 133 L. Ed.2d 205; In re Kirkland, 915 F.2d 1236, 1238-39 (9th Cir. 1990)(applying Cal. statute); Federal Sav. and Loan Ins. Corp. v. Butler, 904 F.2d 505, 510 (9th Cir. 1990)(applying Cal. statute); Triangle Mining Co., Inc. v. Stauffer Chemical Co., 753 F.2d 734, 738 (9th Cir. 1985)(applying Idaho law); Winchester v. Lester's of Minnesota, Inc., 983 F.2d 992, 994 (10th Cir. 1993)(applying Kan. statute); Stafos v. Jarvis, 477 F.2d 369, 372 (10th Cir. 1973)(applying Kan. law); United Aluma Glass v. Bratton Corp., 8 F.3d 756, 759 (11th Cir. 1993)(applying Fla. law); Joe Morgan, Inc. v. Amsouth Bank, N.A., 985 F.2d 1554, 1558 (11th Cir. 1993)(applying Ala. statute)("While we review subjective good faith holdings for clear error, ... a district court's determination of objective good faith should be reviewed de novo." Id.; citations omitted.); Flagship Marine Services, Inc. v. Belcher Towing Co., 966 F.2d 602, 604 (11th Cir. 1992)(applying federal law); Barnes v. Lacy, 927 F.2d 539, 543 (11th Cir. 1991)(applying federal statute), cert. denied, 112 S. Ct. 372, 116 L. Ed.2d 324; Fawn Min. Corp. v. Hudson, 80 F.3d 519, 521 (D.C. Cir. 1996)(applying federal statute); Imazio Nursery, Inc. v. Dania Greenhouses, 69 F.3d 1560, 1564 (Fed. Cir. 1995)(applying federal statute), cert. denied, 116 S. Ct. 2549, 135 L. Ed.2d 1069.

The four cases upon which the Court of Appeals based its conclusion that the issues of good cause, good faith, reasonableness, and notice constitute issues of fact under Michigan law are distinguishable. Three of the cases did not involve the interpretation of a statute. Safeco Ins. Co. v. City of White House, Tennessee, 36 F.3d 540 (6th Cir. 1994), involved a contract between a contractor and a municipality. The relevant issue was whether the contractor had breached

the covenant of good faith implied in every contract under Tennessee law. This is distinguishable from interpreting the Wine Act's statutory good faith provision, which is identical to the Michigan Uniform Commercial Code's ("U.C.C.") definition of good faith that applies between merchants (M.C.L. §440.2103(b); M.S.A. §19.2103(b)), as distinguished from the definition that applies between merchants and consumers (M.C.L. §440.1201(19); M.S.A. §19.201).

Eastern Coal Corp. v. McNally Pittsburgh Manufacturing Corp., 274 F.2d 157 (6th Cir. 1960), was likewise a contract case, applying Kentucky law. The issue was whether the plaintiff had performed the contract within a reasonable time. This was deemed to be a question of fact under Kentucky law. Whether a time interval is "reasonable" would generally be regarded as a jury question. This is distinguishable from the issue raised in this case regarding whether under the Wine Act Brown-Forman's termination of Viviano's franchise was based on an alleged breach of "a provision of the agreement which is both reasonable and of material significance to the business relationship between the wholesaler and the supplier." This question of "reasonableness" is the kind of mixed law and fact question that the authorities cited above have repeatedly regarded as requiring de novo review. Device Trading Ltd. v. Viking Corp., 105 Mich. App. 517; 307 N.W.2d 362 (1981), similarly did not involve the interpretation of a statute, but dealt with a factual issue regarding whether the plaintiff had used reasonable efforts to mitigate its damages. This question of "reasonableness" is again distinguishable from the Wine Act's requirement that a breach justifying termination must involve a reasonable and materially significant contract provision.

The fourth case, Karibian v. Paletta, 122 Mich. App. 353; 332 N.W.2d 484 (1983), involved the "subjective" U.C.C. definition of good faith set forth in M.C.L. §440.1201(19) as "honesty in fact in the conduct or transaction concerned."

(Emphasis added.) This is not the good faith provision applicable in this case - §30c(9) of the Wine Act incorporates the definition applicable to merchants, defined in M.C.L. §440.2103 as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." (Emphasis added.) See Farnsworth, Good Faith Performance And Commercial Reasonableness Under The Commercial Code, 30 U. Chicago L. Rev. 666, 670-2 (1963), wherein the author distinguishes between the "honesty in fact" subjective standard and the definition that applies to merchants, stating of the latter, id. at 672, "[T]he Code has explicitly incorporated an objective standard." (Footnote omitted) See also Summers, "Good Faith" in General Contract Law And The Sales Provisions Of The Uniform Commercial Code, 54 Va. L. Rev. 195 (1968), 210-1, note 69. The mercantile definition of "good faith" thus involves application of the kind of objective statutory standard that the Court of Appeals recognized in K & M Joint Venture presents a mixed question of law and fact not subject to the clearly erroneous standard. See also Joe Morgan, Inc., supra, 985 F.2d at 1558.

In contrast to the cases cited by the Court of Appeals, the majority of which did not involve questions of statutory interpretation, a number of cases by the Sixth Circuit and numerous cases decided by Michigan courts have held that judicial interpretation of Michigan statutes involves questions of law that are subject to de novo review. Thus in U.S. Fibres v. Proctor & Schwartz, 509 F.2d 1043 (6th Cir. 1975), the Sixth Circuit held that whether exclusion of a warranty of merchantability was sufficiently "conspicuous" under the Michigan U.C.C. was "a question of law for the court." 509 F.2d at 1047. In Citizens Insurance Co. of America v. Proctor & Schwartz, Inc., 15 F.3d 558 (6th Cir. 1994), the Court affirmed a holding by the District Court for the Western District of Michigan, 802 F. Supp. 133, 143 (W.D. Mich. 1992), that the question whether a contractual exclusion of consequential damages was "unconscionable" under the

Michigan U.C.C. was "a question of law for the Court to decide."

While there is no reported Michigan decision interpreting the Wine Act, during the pendency of the appeal the Michigan Court of Appeals issued a decision interpreting the parallel Michigan Beer Franchise Act, M.C.L. §436.30b ("Beer Act"). (The Wine Act and the Beer Act were enacted as a single bill and contain virtually identical provisions, with the exception that the Beer Act provides for exclusive wholesaler territories in §30b(1)(h).) In the decision, Monroe Beverage Co., Inc. v. Stroh Brewery Co., 211 Mich. App. 286; 535 N.W.2d 253 (1995), the Court of Appeals asserted, 211 Mich. App. at 291:[4]

> Whether a transferee of sales and distribution rights has standing to sue a beer supplier for failure to comply with the Liquor Control Act is a matter of statutory interpretation. **Statutory interpretation is a question of law reviewed on appeal de novo.** ...
>
> The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. ... If reasonable minds can differ as to the meaning of a statute, judicial construction is appropriate. ... **The court must look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction which best accomplishes the statute's purpose.** ... Nothing will be read into a statute which is not within the manifest intention of the Legislature as gathered from the act itself. ... (Emphasis added; citations omitted.)

See also Lakeshore Bd. of Education v. Grindstaff, 436 Mich.

[4] The decision was published after the parties had filed their briefs. Petitioner therefore sent copies of the decision to the Court of Appeals prior to oral argument.

339, 356-57; 461 N.W.2d 651 (1990)(whether a teacher's conduct constitutes "reasonable and just cause" for discharge under the Michigan Teachers Tenure Act is "an issue of law and fact" subject to de novo review); American Telephone & Telegraph Co. v. Michigan Emp. Sec. Comm., 376 Mich. 271, 283-85; 136 N.W.2d 889 (1965)(whether facts indicate that statutory assurance of reemployment was given is question of law); Wickey v. MESC, 369 Mich. 487, 490-500; 120 N.W.2d 181 (1963)(whether facts indicate employee voluntarily left work without good cause attributable to employer within meaning of statute question of law); Alger v. Michigan Public Service Comm., 339 Mich. 104, 111-12; 62 N.W.2d 588 (1954)(whether facts indicate forfeiture of common carrier certificate under statute question of law).

The decision of the Michigan Court of Appeals in Monroe Beverage represents a definitive statement of the law of statutory construction and appellate review under Michigan law. It is directly antithetical to the holding of the Court of Appeals that under Michigan law judicial construction of the relevant terms of the Wine Act presented questions of fact that were subject to the "clearly erroneous" standard of review, rather than questions of law subject to de novo review. Although the Court of Appeals acknowledged that it was required to review "the district court's interpretation of the Act - a question of law - de novo," by construing the operative terms of the Act as questions of fact subject to the clearly erroneous standard, it left nothing in the statute to which de novo review would apply.

Thus, nowhere in the Court of Appeals' Opinion is there any discussion of the meaning, purpose, or legislative history of any of the Wine Act's applicable provisions. Nowhere did the Court discuss Brown-Forman's proposition that the performance of distributors that called on many accounts, without selling Korbel to most of them, was superior to that of Viviano, which the record unequivocally indicated was

selling Korbel to most of the accounts it called on. Nowhere did the Court discuss the unrebutted testimony of Viviano's two experts, one an attorney who had participated in the drafting of the Wine Act and the other a business valuation analyst, both of whom agreed that Brown-Forman's demand that Viviano call on all of the same accounts being called on by the other distributors was not commercially reasonable. (Foresman, Vol. VIII, 4355-60, 4363, 4369-70; Kohn, Vol. VIII, 4305, 4339-41, 4344-45) Nowhere did the Court address the admission of Brown-Forman's own Area Manager that its demand made little sense, since in those accounts where Korbel was present, regardless which distributor had sold it there, Brown-Forman's business objectives had been met (Rocco, Vol. VIII, 4520-21); and in those accounts where Korbel was absent, even though at least one of the other distributors had been calling on it, "[i]t's probably not a good use of sales time" to require Viviano to call on them as well (Rocco, Vol. VIII, 4523). And nowhere did the Court address Viviano's argument that consequently the breach of such a condition, even if required by their contract (which Viviano disputed), could not constitute failure "to comply with a provision of the agreement which is both reasonable and of material significance to the business relationship."

The Court of Appeals likewise failed to address any of the other legal arguments that Viviano raised both at trial and on appeal, to wit: **(1)** that Viviano could not be terminated when it had satisfied its obligation under §30c(14) to "devote reasonable efforts and resources to sales and distribution" of Korbel; **(2)** that the trial court's assertion on page 1 of the Judgment that, "That which makes business, logical, economical or philosophical sense for a distributor may not necessarily make the same sense for the supplier, and vice versa" evidenced a misunderstanding of the Wine Act's purpose to preclude a distributor's termination based on the perceived business needs of the supplier, rather than for objective good cause related to the distributor's performance;

(3) that failure to call on all of the accounts called on by the other distributors could not constitute a breach either of the original "best efforts" contract or the "all reasonable efforts" contract that replaced it by operation of law; (4) that under Michigan law a "best efforts" contract is not enforceable in a nonexclusive, multiple distributor market (per Tigg Corp. v. Dow Corning Corp., 962 F.2d 1119 (3d Cir. 1992), cert. dismissed, 506 U.S. 1042, 113 S. Ct. 834, 122 L. Ed.2d 111 (1992), wherein the Court, applying Michigan U.C.C. law, asserted, 962 F.2d at 1126, note 7: "[U]nder a requirements contract lacking an exclusive dealing provision, no 'best efforts' duty would exist."); (5) that Brown-Forman's appointment of nineteen additional distributors after Viviano executed the original contract constituted interference with Viviano's performance of the contract as Brown-Forman proposed to interpret it; (6) that in the absence of proof of a breach of a reasonable and materially significant provision of their contract, Brown-Forman's notice of noncompliance and imposition of the PIP were improper; (7) that Brown-Forman's knowledge for more than two years prior to the termination that Viviano was not calling on all of the same retailers called on by the other distributors constituted a waiver under §30c(8)(b); (8) that Brown-Forman's purported notice of noncompliance (Ex. 6, Vol. III, 1427-36) failed to inform Viviano of which provision of their contract Viviano had allegedly breached and thereby failed to comport with the notice requirements of the Act; (9) that Brown-Forman terminated Viviano as a pretext for reorganizing its distribution system into exclusive county-wide territories and thereby violated the good faith provision of the Wine Act.

By construing the issues of good cause, good faith, reasonableness, and notice under the Wine Act as questions of fact, the Court of Appeals effectively adopted the deferential review of the District Court's interpretation of a Michigan statute which the Supreme Court specifically rejected in Salve Regina, supra. As the Supreme Court noted

in Salve Regina, the purpose of diversity jurisdiction and the Erie doctrine is to assure meaningful, independent analysis of state law. This doctrine clearly applies as rigorously to the state's statutory law as to its general law. While the right of a noncitizen defendant to remove a case to federal court pursuant to diversity jurisdiction is intended to avoid "inequitable administration of the laws" by state courts against noncitizen parties, by the same token the citizen plaintiff is not to be deprived thereby of a "meaningful review" of its state's laws in federal court. Writing for the majority in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), Justice Brandeis thus reiterated Justice Field's objections in Baltimore & Ohio R. R. Co. v. Baugh, 149 U.S. 368, 401, 13 S. Ct. 914, 37 L. Ed. 772 (1893), to the doctrine of "federal general law" espoused under Swift v. Tyson, 41 U.S. (16 Pet.) 1, 10 L. Ed. 865 (1842), as follows, 304 U.S. at 78-79:

> [N]otwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states, - independence in their legislative and independence in their judicial departments. **Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.** (Emphasis added.)

The Supreme Court proceeded to hold, 304 U.S. at 80, "We ... declare that in applying the doctrine [of Swift v.

Tyson] this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states." While Erie was addressing the application of a state's general law in federal courts, as Justice Field's protest points out, the concern is no less compelling when a state's legislative enactments are at issue. By refusing to apply de novo review to the District Court's application of the Wine Act to the facts of this case, the Court of Appeals usurped the power and authority of the State of Michigan to enforce its own laws in an area expressly committed to its exclusive superintendence under the XXIst Amendment. In so doing, the Court of Appeals acted in contravention of the Constitution, 28 U.S.C. §1652, and the Supreme Court's express direction in Salve Regina.

The case must accordingly be remanded to the Court of Appeals with a directive that it apply de novo review to the District Court's application of the Wine Act to the facts of this case.

II. THE COURT OF APPEALS IMPROPERLY FAILED TO CONDUCT DE NOVO REVIEW OF THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT TO THE RESPONDENT ON THE ISSUES OF NOTICE AND THE TWO-YEAR WAIVER PROVISION.

Prior to trial, the parties filed cross-motions for summary judgment regarding whether Brown-Forman had satisfied the requirements of the Wine Act. The trial court denied Viviano's motion and granted Brown-Forman's motion in part, holding that Brown-Forman had satisfied the notice requirements of the Act and had not violated the two-year restriction contained in §30c(8)(b). (Vol. I, 239)

Viviano challenged both of these rulings on appeal. Regarding the notice issue, Viviano maintained that the

purported letter of noncompliance (Ex. 6, Vol. III, 1427-36) failed to indicate how Viviano had breached the agreement because it did not specify which provision(s) allegedly had been breached. While the letter did contain a summary of the principal provisions of the contract, it did not state which provision(s) Viviano was accused of having violated.

Viviano further contended that none of the letters that Brown-Forman sent thereafter remedied the deficiency of the initial letter and satisfied three prerequisites of a valid notice under the Act: (1) assserted that Viviano had breached the contract; (2) identified the breach so that Viviano would have a "reasonable opportunity" to correct it; and (3) afforded Viviano at least 100 days to do so prior to the letter of termination of August 14, 1992.

Regarding the two-year restriction, which requires that "[t]he supplier first acquired knowledge of the failure ... not more than 2 years before" the date of notification of termination, the trial court held that this requirement was satisfied as long as Viviano engaged in conduct which violated the contract during the two years prior to its termination, even if Brown-Forman had known for more than two years that Viviano was engaging in that conduct. (Vol. X, 5222, 5243-44) Viviano argued that this interpretation distorted the purpose of the provision and converted it from a waiver provision into a statute of limitation.

Viviano maintained that the purpose of the two-year restriction was to prevent a supplier from using conduct which it was aware of for more than two years as a pretext for terminating a distributor. If the supplier was aware of a breach for more than two years and failed to enforce the provision in question, the provision could not qualify as one which was "of material significance to the business relationship." Since this was a prerequisite under the Act for an alleged breach to qualify as the basis for a termination,

failure to enforce a provision which the supplier was aware was being breached two years before it sent a notice of termination would not constitute good cause under the Act, even if the alleged breach continued during the two-year period.

Viviano pointed out to the Court of Appeals that the record indisputably showed that Brown-Forman was aware for more than two years that Viviano was not calling on all of the same accounts that the other Korbel distributors claimed they called on. It was demonstrated by, among other things, the very same documentary evidence that Brown-Forman claimed at trial proved Viviano was not calling on all of these accounts - the Market Profiles, which Brown-Forman indicated each distributor, including Viviano, submitted every year stating the number of accounts that they serviced in their respective territories. (Blount, Vol. VIII, 4147-48) By tallying the number of accounts each distributor represented it serviced and comparing the total to that indicated in Viviano's Market Profile, Brown-Forman claimed it proved that Viviano was breaching its agreement. But since Brown-Forman acknowledged that it obtained the Market Profiles every year, it had known that this was the case since 1987, when the other distributors were first appointed.

Since good cause for termination requires that both the notice requirement and the two-year restriction be complied with, evidence that Brown-Forman had failed to carry its burden of proof regarding either issue would have required reversal. Petitioner noted in its appellate brief that the Sixth Circuit has repeatedly held that a trial court's grant of summary judgment is reviewed de novo. See, e.g., Wiley v. U.S., 20 F.3d 222, 224 (6th Cir. 1994); Front Row Theatre, Inc. v. American Manufacturer's Mutual Ins. Co., 18 F.3d 1343, 1346 (6th Cir. 1994). This is likewise the standard of review in the other circuits as well. See, e.g., Dupps v. Travelers Ins. Co., 80 F.3d 312, 313 (8th Cir. 1996); Finley

v. Giacobbe, 79 F.3d 1285, 1290 (2d Cir. 1996); Conkle v. Jeong, 73 F.3d 909, 915 (9th Cir. 1995); Sample v. Aldi Inc., 61 F.3d 544, 546 (7th Cir. 1995); Tom Mistick & Sons, Inc. v. Reich, 54 F.3d 900, 903 (D.C. Cir. 1995); Young-Montnay, Inc. v. U.S., 15 F.3d 1040, 1041-42 (Fed. Cir. 1994).

Despite this precedent, there is only a brief reference to the notice question and absolutely no discussion of the two-year restriction in the Court of Appeals' Opinion. Petitioner submits that this does not qualify as the de novo review of these issues to which it was entitled. The decision of the Court of Appeals must accordingly be remanded for a proper application of de novo review to the District Court's grant of summary judgment.

CONCLUSION

For these compelling reasons which indicate that the failure of the Court of Appeals to conduct de novo review of the District Court's interpretation of the Michigan Wine Franchise Act contravened the Constitution and Supreme Court precedent, Petitioner requests that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Dated: November 18, 1996

APPENDIX

APPENDIX A

FILED
July 10 1996
Leonard Green, Clerk

NOT RECOMMENDED FOR PUBLICATION

No. 94-1831

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Viviano Wine Importers, Inc.

Plaintiff-Appellant,

v.

Brown-Forman Corporation dba Brown-Forman Beverage Company, Wine Division

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: NELSON, BATCHELDER, Circuit Judges, and McKEAGUE, District Judge*

PER CURIAM. In this diversity action, we are asked

*The Honorable David W. McKeague, District Judge United States District Court for the Western District of Michigan, sitting by designation.

to decide whether Brown-Forman Corporation ("B-F") lawfully terminated a long-standing distribution agreement with Viviano Wine Importers, Inc. ("Viviano"). Our resolution of this case turns on whether B-F complied with the requirements of the Michigan Liquor Control Act ("the Act"), M.C.L.A. § 436.30 *et seq.* (West. 1995),[1] which, among other things, governs the relationship between wholesalers and suppliers of wine.

After a bench trial, the district court held that B-F's actions satisfied the requirements of the Act. We **AFFIRM.**

I.

B-F, a Delaware Corporation with principal offices in Kentucky, is the national distributor for Korbel Champagne. Viviano, a Michigan corporation, enjoyed the exclusive right to sell Korbel Champagne to retailers in Michigan from May 1969 until some time in mid-1984, when B-F designated other wholesalers as Korbel distributors. In 1985, Viviano entered into a distributor contract with B-F ("the 1985 contract"). At the time it entered into the contract, Viviano knew that the contract was non-exclusive and that B-F had already designated other Korbel distributors in Michigan. Viviano also know that it was responsible under the contract to distribute Korbel throughout the entire state of Michigan.

After the parties signed the 1985 contract, changes in B-F management resulted in growing pressure on Viviano to help B-F increase the market share of Korbel Champagne. Viviano and B-F conducted a series of meetings which ultimately led to a letter dated February 26, 1992, written by Kenneth A. Blount, Vice President of the B-F Wine Division,

[1]According to the district court, the parties stipulated that Viviano's claims are based on 1984 PA 159 (Franchise Act). Neither party disavows this stipulation and we, therefore, have no occasion to consider its propriety.

to the President of Viviano, Norman G. Viviano. In this letter, Blount detailed various deficiencies that B-F perceived in Viviano's conduct as a distributor. It cited various provisions of the 1985 contract between the parties and explained that, as part of a performance improvement plan, it was going to require that Viviano cure the deficiencies in its distribution pursuant to the 1985 contract and satisfy all of the terms of that contract. In the letter, Blount invoked the Act, and explained that B-F intended to terminate Viviano if its performance did not improve according to the terms contained in the letter, including the statutorily required time-frame for improvement.

Following considerable correspondence and wrangling between the parties, B-F terminated its relationship with Viviano, effective August 29, 1992 (fifteen days from the date of notice served in the letter). Viviano subsequently brought suite, claiming that its termination was unlawful. B-F prevailed in the court below, and Viviano now brings this timely appeal.

II.

Michigan courts have considered questions of good faith, reasonableness, good cause, and notice as factual determinations to be made by the trier of fact. *Karibian v. Paletta,* 332 N.W.2d 484, 487 (Mich. Ct. App. 1983) (notice and good faith are questions of fact); *Device Trading, Ltd. v. The Viking Corp,* 307 N.W.2d 362, 366 (Mich. Ct. App. 1981) (reasonableness is a question of fact). Federal courts have done the same. *Safeco Ins. Co. v. City of White House, Tenn.,* 36 F.3d 540, 548 (6th Cir. 1994) (good faith is a question of fact); *Eastern Coal Corp. v. McNally Pittsburg Mfg. Corp.,* 274 F.2d 157, 158-59 (6th Cir. 1960) (reasonableness is a question of fact). We review a trier of fact's factual determinations for clear error, but review the district court's interpretation of the Act-a question of law-*de*

novo. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991) (review of a district court's interpretation of a state statue is *de novo*).

After a full hearing on the merits, the district court found that B-F had complied with the letter of the Act, both as a matter of fact and as a matter of law, in terminating its contractual relationship with Viviano. We have reviewed the extensive record in this case, and have given due consideration to the district court's rulings (both express and implied), the terms of the Act, the contractual agreements (and modifications) between the parties, as well as the parties' respective arguments on appeal. Viviano has done nothing to persuade us that any of its assignments of error requires reversal of the district court's disposition of this case. We, therefore, **AFFIRM** the district court's conclusion that B-F complied with the letter of the Act, and that it did not act unlawfully in taking the actions it did in respect of its contractual relationship with Viviano.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VIVIANO WINE IMPORTERS, INC.,

Plaintiff,

vs. Civil Action
No. 92-CV-75983-DT

BROWN-FORMAN CORPORATION,
d/lo/a BROWN-FORMAN BEVERAGE
HON. BERNARD A. FRIEDMAN
COMPANY (Wine Division), HON. BERNARD A.
FRIEDMAN

Defendant.

_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was heard by the court during eight days of trial between April 25, 1994, and June 8, 1994. Eight witnesses were called by the parties, and by stipulation, the court has read the deposition of Richard Stricker. The matter was submitted to the court on June 8, 1994, and each side has filed supplemental proposed findings of fact and conclusions of law.

Introduction

This case involves the differences in the marketing philosophies and business motivation of the parties as they

relate to the Wine Franchise Act. That which makes business, logical, economical or philosophical sense for a distributor may not necessarily make the same sense for the supplier, and vice versa.

Evidentiary Considerations. i.e. "The Survey"

The question of "the survey" (defendant's exhibits 488, 489, 490 and related documents and testimony) was received by the court. It is important to note that the court agrees with the position of the plaintiff that, using the traditional survey criteria and methodology, this survey is fatally flawed. However, the court believes that although the survey cannot and should not be used in the traditional sense or way that surveys are used, it should, however, be considered as it relates to the defendant's burden of establishing good faith termination for good cause, if any -- understanding, of course, this court's duty in evaluating this evidence as to weight and relevance.

Stipulated Facts and Relevant Preliminary Court Rulings

This court, by order dated March 22, 1994, for the reasons placed on the record, ruled that the termination satisfies the notice requirements of Public Act 159 of 1984, M.C.L.A. 436.30(c), et seq., commonly called the Wine Franchise Act ("the Act"). After the trial, the court reviewed the testimony and exhibits in relation to the notice requirement of the Act, and it was clearly established that all requirements for notice under the Act had been met.

The parties, in their Joint Final Pretrial Order, have stipulated to the following facts, which the court accepts and adopts:

1. Plaintiff, Viviano Wine Importers, Inc., is a Michigan corporation with its principal offices located at 15100 Second

Boulevard, City of Highland Park, County of Wayne, State of Michigan.

2. Defendant, Brown-Forman Corporation, is a Delaware corporation with its principal offices located at 850 Dixie Highway, City of Louisville, State of Kentucky.

3. Plaintiff's claims are based on 1984 PA 159 (Franchise Act).

4. Brown-Forman has national distribution rights for Korbel Champagne, which is the leading premium domestic champagne.

5. On February 26, 1992, defendant sent to plaintiff the letter attached to the complaint regarding a performance improvement plan.

6. Defendant sent letters to General Liquor Company, L & L Wine and J. Lewis Cooper in early March, 1992, that were essentially the same as the February 26, 1992, letter sent to plaintiff.

7. The parties exchanged the letters dated between February 26, 1992, and August 14, 1992, that are attached to the plaintiff's complaint.

8. By a letter dated August 14, 1992, defendant advised plaintiff that it was terminating plaintiff as a distributor of Korbel Champagne.

9. Defendant tendered the sum of $6,558.46 to the plaintiff on August 24, 1992, and it was refused by plaintiff.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That the plaintiff, from approximately May of 1969,

until 1984, had the exclusive right to sell Korbel Champagne to retail licensees within the State of Michigan.

2. That in mid-1984, defendant designated other wholesalers as Korbel distributors.

3. That on or about September 25, 1985, plaintiff entered into a distributor contract (Exhibit 1).

4. That at the time this contract was entered into, plaintiff was aware that there were other Korbel distributors in the State of Michigan and that its territory and obligation were state-wide, though there were "dual" territories in the state.

5. That the Act does not prohibit a supplier from appointing dual distributors or requiring competition between distributors.

6. That said contract, in addition to other provisions, provided that the plaintiff:

> "will use its best efforts to develop the full potential for, and diligently sell, distribute and promote said Company's Products, in all licensed retail outlets in the territory."

7. Much argument, discussion and testimony evolved around the word "all" in relation to this contract provision. The court finds that in the context of the contract and in light of the testimony and exhibits, including Mr. Vignoe's testimony of May 25, 1994, performance under this contract means all "potential buyers" of Korbel products.

8. The parties further disagreed concerning who potential buyers are. The court finds that the broad definition contemplated by the defendant is neither unreasonable nor inconsistent with the industry. Plaintiff took the position that

many stores were not of the type that should be considered for this product or are served by competitors. However, this is contrary to what the court finds are the facts in this matter. Even Mr. Stricker, though a competitor, acknowledged that Korbel is a type of product at a price that should be in grocery stores, drug stores, ethnic accounts as well as finer wine shops. The court finds that the testimony and exhibits bear out this opinion and further finds that competition is a goal of the Act,[2] and a requirement to call upon competitors' accounts is reasonable.

9. The contract further provides in paragraph 4 an obligation on behalf of plaintiff to provide to the defendant certain information as requested.

10. The defendant requested of the plaintiff a corrective performance plan and notified plaintiff of same, including notice of termination pursuant to the Act. Further, defendant sent plaintiff a letter dated February 26, 1992 (Exhibit 8), outlining its position as to the Act and deficiencies in the contract obligations, citing certain areas, including call frequency and staffing problems. Timetables were established in conformity with the Act.

11. Other distributors who received similar correspondence responded in a timely and meaningful way, though some did ask for, and received, either clarification or extensions.

12. That the communications gap between the parties widened as plaintiff's President assigned a non-decision maker to meet with the representatives of defendant contrary to a long-established practice of doing it himself.

13. Plaintiff failed or refused to supply certain information that the court finds was both reasonable and

[2] MCLA 436.30C(1)(a).

required under the contract. Plaintiff did not submit as required information on call frequency, sales staff or manager successor, as well as other information, including a proposed corrective action plan.

14. Defendant afforded plaintiff reasonable opportunity to comply in good faith, but plaintiff failed to do so.

15. Defendant compiled substantial information and profile data in relation to call frequency, coverage, sales persons, trucks and raw numbers of accounts prior to making any termination decision in this matter.

16. Defendant has met its burden of establishing it acted in good faith and for good cause in terminating plaintiff.

17. Defendant complied with the notice requirements of the Act.

18. There was compliance with the Act, and the termination was proper.

DAMAGES

Based upon the court's Findings of Fact and Conclusions of Law, no actual damages can be awarded. However, in their distributor contract, the parties agreed to certain payments upon cancellation of the agreement. The plaintiff, throughout the trial, has taken exception to this paragraph and has testified as well as introduced exhibits indicating its disagreement with this provision. The court finds that without having to rule upon the validity or invalidity of this paragraph as it relates to the Act, it is in effect the only compensation for cancellation that the plaintiff would be entitled to, as plaintiff is not entitled to actual damages.

COMMENTARY

During this trial and in depositions, it became apparent to this court that the practice of "free goods" was common and may be contrary to Michigan law. It has also been brought to the court's attention that the Michigan Beer and Wine Wholesalers Association has taken a part in this litigation. Perhaps in the spirit of preserving the statutory scheme for the distribution of beer and wine in the state, the Association and others would be well served by bringing violations of law to the attention of the proper authorities and assist in the enforcement, as well as perhaps even instituting a code of conduct and internal procedures within its organization.

ORDER

In accordance with the foregoing Findings of Fact and Conclusions of Law,

IT IS ORDERED that judgment shall enter in favor of defendant and against plaintiff.

/S/
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: JUN 23 1994
Detroit, Michigan

APPENDIX C

FILED
Aug 20 1996
Leonard Green, Clerk

No. 94-1831

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VIVIANO WINE IMPORTERS, INC.,

Plaintiff-Appellant,

v. ORDER

BROWN-FORMAN CORPORATION, DOING BUSINESS AS BROWN-FORMAN BEVERAGE COMPANY, WINE DIVISION,

Defendant-Appellee.

BEFORE: NELSON and BATCHELDER, Circuit Judges; and MCKEAGUE, District Judge.*

The court having received a petition for rehearing en bac, and the petition having been circulated not only to the original panel members but also to all other active judges of

*Hon. David W. McKeague, United States District Judge for the Western District of Michigan, sitting by designation.

this court, and no judge of this court having requested a vote on the suggestion for rehearing en blanc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/S/

Leonard Green, Clerk

APPENDIX D

436.30a. Manufacturer and outstate seller of beer; grant of exclusive territories; assignments of brand extensions

Sec. 30a. (1) A manufacturer and outstate seller of beer and malt beverages shall grant to each of its wholesalers an exclusive sales territory, as agreed upon between the wholesaler and manufacturer or outstate seller of beer, within which the wholesaler shall be the exclusive distributor of the specified brand or brands of the manufacturer or outstate seller of beer.

(2) If the manufacturer or outstate seller manufactures or supplies more than 1 brand of beer or malt beverage, the manufacturer or outstate seller may grant exclusive sales territories to different wholesalers for the sale of the different brand or brands.

(3) Notwithstanding subsection (2), a brand extension is not considered a new or different brand. A manufacturer or an outstate seller of beer or malt beverages shall assign a brand extension to the wholesaler which was granted the exclusive sales territory to the brand from which the brand extension resulted.

(4) Subsection (3) does not apply where, before January 1, 1994, a manufacturer or an outstate seller of beer or malt beverages had assigned a brand extension to a wholesaler which was not the appointed wholesaler for the brand from which the brand extension was made.

(5) Until July 1, 1995, a manufacturer or an outstate seller of beer or malt beverages who acquired or otherwise obtained the right to assign brands of another manufacturer or outstate seller of beer or malt beverages between January 1, 1994 and July 1, 1995 shall assign a brand extension to the wholesaler which was granted the exclusive sales territory to the brand from which the brand extension resulted. Beginning July 1, 1995, a manufacturer or an outstate seller of beer or malt beverages who acquires or otherwise obtains the right to assign brands of another manufacturer or outstate seller of beer or malt beverages is not required to assign a new brand extension to the wholesaler which is granted the exclusive sales territory to the brand from which the new brand extension results. Any brand extension assigned between January 1, 1 994 and July 1, 1995 shall remain assigned to the assigned wholesaler.

(6) The sales territory shall be the territory agreed upon between the wholesaler and manufacturer or outstate seller.

436.30b. Structure for business relationship between beer wholesaler and supplier

Sec. 30b. (1) The purpose of this section is to provide a structure for the business relations between a wholesaler of beer and a supplier of beer. Regulation in this area is considered necessary for the following reasons:

(a) To maintain stability and healthy competition in the beer industry in this state.

(b) To promote and maintain a sound, stable, and viable 3-tier system of distribution of beer to the public.

(c) To promote the public health, safety, and welfare.

(2) As used in this section, unless the context requires otherwise:

(a) "Agreement" means any agreement between a wholesaler and a supplier, whether oral or written, whereby a wholesaler is granted the right to offer and sell a brand or brands of beer sold by a supplier.

(b) "Ancillary business" means a business owned by a wholesaler, a stockholder of a wholesaler, or a partner of a wholesaler the primary purpose of which is directly related to the transporting, storing, or marketing of the brand or brands of beer of a supplier with whom the wholesaler has an agreement; or a business owned by a wholesaler, a stockholder of a wholesaler, or a partner of a wholesaler which recycles empty returnable beverage containers.

(c) "Designated member" means the spouse, child, grandchild, parent, brother, or sister of a deceased individual who owned an interest in a wholesaler, who is entitled to inherit the deceased individual's ownership interest in the wholesaler under the terms of the deceased individual's will, or who has otherwise been designated in writing by the deceased individual to succeed the deceased individual in the wholesaler's business, or is entitled to inherit such ownership interest under the laws of intestate succession of this state. With respect to an incapacitated individual owning an ownership interest in a wholesaler, the term means the person appointed by a court as the conservator of such individual's property. The term also includes the appointed and qualified personal representative and the testamentary trustee of a deceased individual owning an ownership interest in a wholesaler.

(d) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade, as defined and interpreted under section 2103 of the uniform

commercial code, Act No. 174 of the Public Acts of 1962, being section 440.2103 of the Michigan Compiled Laws.

(e) "Master distributor" means a wholesaler who acts in the same or similar capacity as a brewer or outstate seller of beer for a brand or brands of beer to other wholesalers on a regular basis in the normal course of business.

(f) "Reasonable qualifications" means the average standard of the criteria used by the respective supplier for wholesalers that entered into or renewed an agreement with the supplier during a period of 24 months prior to the proposed transfer of the wholesaler's business.

(g) "Retaliatory action" means action which includes, but is not limited to, the refusal to continue an agreement, or a material reduction in the quality of service or quantity of products available to a wholesaler under an agreement, which refusal or reduction is not made in good faith.

(h) "Sales territory" means an area of exclusive sales responsibility for the brand or brands of beer sold by a supplier as designated by an agreement.

(i) "Successor" means a supplier who obtains, in any manner from any person, including a person who is not a supplier, the distribution rights of 1 or more brands of beer which a licensed Michigan wholesaler has distributed in this state pursuant to an agreement with another supplier who previously had the distribution rights for the brand or brands.

(j) "Supplier" means a brewer, an outstate seller of beer, or a master distributor.

(k) "Transfer of a wholesaler's business" means the voluntary sale, assignment, or other transfer of the business or control of the business of the wholesaler, including the sale or other

transfer of stock or assets by merger, consolidation, or dissolution.

(3) A supplier shall not do any of the following:

(a) Coerce, or attempt to coerce, any wholesaler to accept delivery of any beer or other commodity which has not been ordered by the wholesaler. However, a supplier may impose reasonable inventory requirements upon a wholesaler if the requirements are made in good faith and are generally applied to other wholesalers having an agreement with the supplier.

(b) Coerce, or attempt to coerce, any wholesaler to accept delivery of any beer or other commodity ordered by a wholesaler if the order was properly canceled by the wholesaler in accordance with the procedures agreed upon by the supplier and wholesaler.

(c) Coerce, or attempt to coerce, any wholesaler to do any illegal act by threatening to amend, cancel, terminate, or refuse to renew any agreement existing between the supplier and wholesaler.

(d) Require a wholesaler to assent to any condition, stipulation, or provision limiting the wholesaler's right to sell the brand or brands of beer of any other supplier anywhere in this state unless the acquisition of the brand or brands of another supplier would materially impair the quality of service of the brand or brands of the supplier presently being sold by the wholesaler.

(e) Require a wholesaler to purchase 1 or more brands of beer in order for the wholesaler to purchase another brand or brands of beer for any reason. However, a wholesaler that has agreed to distribute a brand or brands before June 26, 1984 shall continue to distribute the brand or brands in conformance with this section.

(f) Request a wholesaler to submit profit and loss statements, balance sheets, or financial records as a requirement for renewing or retaining an agreement.

(g) Withhold delivery of beer ordered by a wholesaler, or change a wholesaler's quota of a brand or brands if the withholding or change is not made in good faith.

(h) Require a wholesaler by any means to participate in or contribute to any local or national advertising fund controlled directly or indirectly by a supplier.

(i) Fail to provide each wholesaler of the supplier's brand or brands with a written agreement which contains, in total, the supplier's agreement with each wholesaler and which designates a specific sales territory. Any agreement which is in existence on June 26, 1984 shall be renewed consistent with this section, except that this section may be incorporated by reference in the agreement.

(j) Fix, maintain, or establish the price at which a wholesaler shall sell any beer.

(k) Take any retaliatory action against a wholesaler that files a complaint regarding an alleged violation by the supplier of state or federal law or an administrative rule.

(1) Require or prohibit any change in the manager or successor manager of any wholesaler who has been approved by the supplier as of June 26, 1984. Should a wholesaler change an approved manager or successor manager, a supplier shall not require or prohibit the change unless the person fails to meet the reasonable written standards for Michigan wholesalers of the supplier which standards have been provided to the wholesaler.

(m) Require by a provision of any agreement or other instrument in connection with the agreement that any dispute arising out of or in connection with that agreement be determined through the application of any other state's laws, be determined in federal court sitting in a state other than Michigan, or be determined in a state court of a state other than the state of Michigan. A provision contained in any agreement or other instrument in connection with the agreement which contravenes this subdivision shall be null and void.

(4) A wholesaler shall not sell or deliver beer to a retail licensee located outside the sales territory designated by the supplier of a particular brand or brands of beer. However, during periods of temporary service interruptions impacting a particular sales territory, a wholesaler who normally services the impacted sales territory shall file with the commission a written notice designating the specific wholesaler or wholesalers who will service the sales territory during the period of temporary service interruption and the approximate length of time of the service interruption. When the temporary service interruption is over, the wholesaler who normally services the sales territory shall notify in writing the commission and the wholesaler, or wholesalers, which is servicing the sales territory on a temporary basis of this fact and any wholesaler servicing the sales territory on a temporary basis shall cease servicing the sales territory upon receipt of the notice.

A wholesaler who is designated to service the impacted sales territory during the period of temporary service shall not be in violation of this subsection.

A wholesaler who has been designated to service the impacted sales territory during the period of temporary service interruption shall not have any of the rights provided under subsections (6) to (12).

(5) A supplier or wholesaler shall not restrict or inhibit, directly or indirectly, the right of free association among suppliers or wholesalers for any lawful purpose.

(6) Notwithstanding the terms, provisions, or conditions of any agreement, a supplier shall not amend any agreement unless the supplier is acting in good faith in making the amendment.

(7) Notwithstanding any agreement and except as otherwise provided for in this section, a supplier shall not cause a wholesaler to resign from an agreement; or cancel, terminate, fail to renew, or refuse to continue under an agreement unless the supplier has complied with all of the following:

(a) Has satisfied the applicable notice requirements of subsection (10).

(b) Has acted in good faith.

(c) Has good cause for the cancellation, termination, nonrenewal, discontinuance, or forced resignation.

(8) Notwithstanding any agreement, good cause shall exist for the purposes of a termination, cancellation, nonrenewal, or discontinuance under subsection 7(c) when all of the following occur:

(a) There is a failure by the wholesaler to comply with a provision of the agreement which is both reasonable and of material significance to the business relationship between the wholesaler and the supplier.

(b) The supplier first acquired knowledge of the failure described in subdivision (a) not more than 2 years before the date notification was given pursuant to subsection (7).

(c) The wholesaler was given written notice by the supplier of failure to comply with the agreement.

(d) The wholesaler was afforded a reasonable opportunity to assert good faith efforts to comply with the agreement within the time limits as provided for in subdivision (e).

(e) The wholesaler has been afforded 30 days in which to submit a plan of corrective action to comply with the agreement and an additional 90 days to cure such noncompliance in accordance with the plan.

(9) For each termination, cancellation, nonrenewal, or discontinuance, the supplier shall have the burden of showing that it has acted in good faith, that the notice requirements under this section have been complied with, and that there was good cause for the termination, cancellation, nonrenewal, or discontinuance.

(10) Notwithstanding any agreement and except as otherwise provided in this section, the supplier shall furnish written notice of the termination, cancellation, nonrenewal, or discontinuance of an agreement to the wholesaler not less than 15 days before the effective date of the termination, cancellation, nonrenewal, or discontinuance. The notice shall be by certified mail and shall contain all of the following:

(a) A statement of intention to terminate, cancel, not renew, or discontinue the agreement.

(b) A statement of the reason for the termination, cancellation, nonrenewal, or discontinuance.

(c) The date on which the termination, cancellation, nonrenewal, or discontinuance takes effect.

(11) Notwithstanding subsections (7) and (10), a supplier may terminate, cancel, fail to renew, or discontinue an agreement upon written notice given in the manner and containing the information required by subsection (10) if any of the following occur:

(a) Insolvency of the wholesaler, the filing of any petition by or against the wholesaler under any bankruptcy or receivership law, or the dissolution or liquidation of the wholesaler which materially affects the wholesaler's ability to remain in business.

(b) Revocation of the wholesaler's license by the commission whereby the wholesaler cannot service the wholesaler's sales territory for more than 60 days.

(c) The wholesaler, or an individual who owns more than 10% of the stock of a corporate wholesaler, has been convicted of a felony. As used in this subdivision, "felony" means a felony under the United States code or the Michigan Compiled Laws. However, an existing approved stockholder or stockholders shall have the right to purchase the stock of the offending stockholder prior to the conviction of the offending stockholder and, if the sale is completed prior to conviction, the provisions of this subdivision shall not apply.

(12) Notwithstanding subsections (7), (10), and (11), upon not less than 15 days' prior written notice given in the manner and containing the information required by subsection (10), a supplier may terminate, cancel, fail to renew, or discontinue an agreement if any of the following events occur:

(a) There was fraudulent conduct on the part of the wholesaler in dealings with the supplier.

(b) The wholesaler failed to confine its sales of a brand or brands to the assigned sales territory. This subdivision does

not apply if there is a dispute between 2 or more wholesalers as to the boundaries of the assigned territory, and the boundaries cannot be determined by a reading of the description contained in the agreements between the supplier and the wholesalers.

(c) The sale by the wholesaler of any brand or brands sold by the supplier to the wholesaler and known by the wholesaler to be ineligible for sale prior to the actual sale to the retailer. The supplier shall repurchase the ineligible product from the wholesaler when the ineligibility is caused by the supplier. The supplier must give the wholesaler written notice specifying the ineligible product. This subdivision does not apply when a supplier ships a brand or brands to a wholesaler that must be removed within 60 days of the deadline for retail sale of the product. This 60-day period shall commence upon receipt of the product by the wholesaler.

(13) Notwithstanding subsections (7), (10), (11), and (12), a supplier may terminate, cancel, not renew, or discontinue an agreement upon not less than 30 days' prior written notice if the supplier discontinues production or discontinues distribution in this state of all the brands sold by the supplier to the wholesaler. Nothing in this section shall prohibit a supplier upon not less than 30 days' notice to discontinue the distribution of any particular brand or package of beer. This subsection does not prohibit a supplier from conducting test marketing of a new brand of beer or from conducting the test marketing of a brand of beer which is not currently being sold in this state provided that the supplier has notified the commission in writing of its plans to test market. The notice shall describe the market area in which the test shall be conducted; the name or names of the wholesaler or wholesalers who will be selling the beer; the name or names of the brand of beer being tested; and the period of time during which the testing will take place. A market testing period shall not exceed 18 months.

(14) The wholesaler shall devote reasonable efforts and resources to sales and distribution of all the supplier's products which the wholesaler has been granted the right to sell and distribute and shall maintain reasonable sales levels.

(15) A brewer, an outstate seller of beer, or a master distributor that has designated a sales territory for a wholesaler shall not enter into an additional agreement with any other wholesaler for the same brand or brands of beer in the same territory or any portion of that territory.

(16) A supplier shall not withhold consent to any transfer of a wholesaler's business if the proposed transferee meets the material and reasonable qualifications and standards required by the supplier. A wholesaler shall give the supplier written notice of intent to transfer the wholesaler's business. A supplier shall not unreasonably delay a response to a request for a proposed transfer of a wholesaler's business. However, a transfer of a wholesaler's business which is not approved by the supplier shall be null and void. A supplier shall not interfere with, or prevent, the transfer of the wholesaler's business if the proposed transferee is a designated member.

(17) A supplier that has amended, canceled, terminated, or refused to renew any agreement; has caused a wholesaler to resign from an agreement; or has withheld consent to any assignment or transfer of a wholesaler's business, except as provided for in this section, shall pay the wholesaler reasonable compensation for the diminished value of the wholesaler's business or of any ancillary business which has been negatively affected by the act of the supplier, or both. The value of the wholesaler's business or ancillary business shall include, but not be limited to, its good will.

(18) Either party may, at any time, determine that mutual agreement on the amount of reasonable compensation cannot

be reached. Should such a determination be made, the supplier or the wholesaler shall send written notice to the other party declaring their intention to proceed with arbitration. Arbitration shall proceed only by mutual agreement of both parties.

(19) The matter of determining the amount of compensation under arbitration may, by agreement of the parties, be submitted to a 5-member arbitration panel consisting of 2 representatives selected by the supplier but unassociated with the affected supplier, 2 wholesaler representatives selected by the wholesaler but unassociated with the wholesaler, and an impartial arbitrator.

(20) Not more than 10 days after the notice to enter into arbitration has been sent, each party shall request, in writing, a list of 5 arbitrators from the American arbitration association. Not more than 10 days after the receipt of the list of 5 choices, the wholesaler arbitrators and the supplier arbitrators may strike and disqualify up to 2 names each from the list. Should either party fail to respond within the 10 days or should more than 1 name remain, the American arbitration association shall make the selection of the impartial arbitrator.

(21) Not more than 30 days after the list of arbitrators is received, the wholesaler and supplier shall exchange in writing the names of their respective arbitration panel representatives.

(22) Not more than 30 days after the final selection of the arbitration panel is made, the arbitration panel shall convene to decide the dispute. The panel shall render a decision by majority vote of the participants within 20 days from the conclusion of the arbitration.

(23) The cost of the impartial arbitrator, the stenographer, and the meeting site shall be equally divided between the wholesaler and the supplier. All other costs shall be paid by the party incurring them. The award of the arbitration panel shall be final and binding on the parties.

(24) After both parties have agreed to arbitrate should either party fail to abide by the time limitations as prescribed in subsections (20), (21), and (22), or fail or refuse to make the selection of any arbitrators, or fail to participate in the arbitration hearings, the other party shall make the selection of their arbitrators and proceed to arbitration. The party who has failed or refused to comply as prescribed in this subsection shall be considered to be in default. Any party considered to be in default pursuant to this subsection shall have waived any and all rights the party would have had in the arbitration and shall be considered to have consented to the determination of the arbitration panel.

(25) A wholesaler shall not waive any of the rights granted in any provision of this section. Nothing in this section shall be construed to limit or prohibit good faith dispute settlements voluntarily entered into by the parties.

(26) A successor to a supplier that continues in business as a brewer, an outstate seller of beer, or a master distributor shall be bound by all terms and conditions of each agreement of the supplier with a wholesaler licensed in this state that were in effect on the date on which the successor received the distribution rights of the previous supplier.

(27) This section shall apply to agreements in existence on June 26, 1984, as well as agreements entered into or renewed after that date.

(28) If a supplier engages in conduct prohibited under this section, a wholesaler with which the supplier has an

agreement may maintain a civil action against the supplier to recover actual damages reasonably incurred as the result of the prohibited conduct. If a wholesaler engages in conduct prohibited under this section, a supplier with which the wholesaler has an agreement may maintain a civil action against the wholesaler to recover actual damages reasonably incurred as the result of the prohibited conduct.

(29) A supplier that violates any provision of this section is liable for all actual damages and all court costs and reasonable attorney fees incurred by a wholesaler as a result of that violation. A wholesaler that violates any provision of this section is liable for all actual damages and all court costs and reasonable attorney fees incurred by the supplier as a result of that violation.

(30) A supplier or wholesaler may bring an action for declaratory judgment for determination of any controversy arising pursuant to this section.

(31) Except as otherwise provided in this section, if a court finds that a supplier has not acted in good faith in effecting an amendment, termination, cancellation, or nonrenewal of any agreement; or has unreasonably withheld its consent to any assignment, transfer, or sale of a wholesaler's business, it may award exemplary damages, as well as actual damages, court costs, and reasonable attorney fees to the wholesaler who has been damaged by the action of the supplier.

(32) Upon proper application to the court, a supplier or wholesaler may obtain injunctive relief against any violation of this section. If the court grants injunctive relief or issues a temporary restraining order, bond shall not be required to be posted.

(33) The procedure for resolving any violation of subsection (3)(a), (b), (c), (e), (f), (h), (i), (j), (k), (l), or (4) shall be the

procedure prescribed by this act and the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws. Any other violation of or dispute regarding this section, unless the dispute is resolved pursuant to subsections (18) to (24), shall only be resolved by a civil action in court as provided in this section and not by the commission.

436.30c. Structure for business relationship between wine wholesaler and supplier

Sec. 30c. (1) The purpose of this section is to provide a structure for the business relations between a wholesaler of wine and a supplier of wine. Regulation in this area is considered necessary for the following reasons:

(a) To maintain stability and healthy competition in the wine industry in this state.

(b) To promote and maintain a sound, stable, and viable 3-tier distribution system of wine to the public.

(c) To recognize the marketing distinctions between beer and wine.

(d) To promote the public health, safety, and welfare.

(2) As used in this section, unless the context requires otherwise:

(a) "Agreement" means any agreement between a wholesaler and a supplier, whether oral or written, whereby a wholesaler is granted the right to offer and sell a brand or brands of wine sold by a supplier.

(b) "Ancillary business" means a business owned by a wholesaler, a stockholder of a wholesaler, or a partner of a wholesaler the primary purpose of which is directly related to the transporting, storing, or marketing of the brand or brands of wine of a supplier with whom the wholesaler has an agreement; or a business owned by a wholesaler, a stockholder of a wholesaler, or a partner of a wholesaler which recycles empty returnable beverage containers.

(c) "Designated member" means the spouse, child, grandchild, parent, brother, or sister of a deceased individual who owned an interest in a wholesaler, who is entitled to inherit the deceased individual's ownership interest in the wholesaler under the terms of the deceased individual's will, or who has otherwise been designated in writing by the deceased individual to succeed the deceased individual in the wholesaler's business, or is entitled to inherit such ownership interest under the laws of intestate succession of this state. With respect to an incapacitated individual owning an ownership interest in a wholesaler, the term means the person appointed by a court as the conservator of such individual's property. The term also includes the appointed and qualified personal representative and the testamentary trustee of a deceased individual owning an ownership interest in a wholesaler.

(d) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade, as defined and interpreted under section 2103 of the uniform commercial code, Act No. 174 of the Public Acts of 1962, being section 440.2103 of the Michigan Compiled Laws.

(e) "Master distributor" means a wholesaler who acts in the same or similar capacity as a wine maker or an outstate seller of wine for a brand or brands of wine to other wholesalers on a regular basis in the normal course of business.

(f) "Reasonable qualifications" means the average standard of the criteria used by the respective supplier for wholesalers that entered into or renewed an agreement with the suppliers during a period of 24 months prior to the proposed transfer of the wholesaler's business.

(g) "Retaliatory action" means action which includes, but is not limited to, the refusal to continue an agreement, or a material reduction in the quality of service or quantity of products available to a wholesaler under an agreement, which refusal or reduction is not made in good faith.

(h) "Sales territory" means an area of sales responsibility for the brand or brands of wine sold by a supplier as designated by an agreement.

(i) "Successor" means a supplier who obtains, in any manner from any person, including a person who is not a supplier, the distribution rights of 1 or more brands of wine which a licensed Michigan wholesaler has distributed in this state pursuant to an agreement with another supplier, who previously had the distribution rights for the brand or brands.

(j) "Supplier" means a wine maker or an outstate seller of wine, or a master distributor.

(k) "Transfer of a wholesaler's business" means the voluntary sale, assignment, or other transfer of the business or control of the business of the wholesaler, including the sale or other transfer of stock or assets by merger, consolidation, or dissolution.

(3) A supplier shall not do any of the following:

(a) Coerce, or attempt to coerce, any wholesaler to accept delivery of any wine or other commodity which has not been ordered by the wholesaler. However, a supplier may impose

reasonable inventory requirements upon a wholesaler if the requirements are made in good faith and are generally applied to other wholesalers having an agreement with the supplier.

(b) Coerce, or attempt to coerce, any wholesaler to accept delivery of any wine or other commodity ordered by a wholesaler if the order was properly canceled by the wholesaler in accordance with the procedures agreed upon by the supplier and wholesaler.

(c) Coerce, or attempt to coerce, any wholesaler to do any illegal act by threatening to amend, cancel, terminate, or refuse to renew any agreement existing between the supplier and wholesaler.

(d) Require a wholesaler to assent to any condition, stipulation, or provision limiting the wholesaler's right to sell the brand or brands of wine of any other supplier anywhere in this state unless the acquisition of the brand or brands of another supplier would materially impair the quality of service of the brand or brands of the supplier presently being sold by the wholesaler.

(e) Require a wholesaler to purchase 1 or more brands of wine in order for the wholesaler to purchase another brand or brands of wine for any reason. However, a wholesaler that has agreed to distribute a brand or brands before June 26, 1984 shall continue to distribute the brand or brands in conformance with this section.

(f) Request a wholesaler to submit profit and loss statements, balance sheets, or financial records as a requirement for renewing or retaining an agreement.

(g) Withhold delivery of wine ordered by a wholesaler, or change a wholesaler's quota of a brand or brands if the withholding or change is not made in good faith.

(h) Require a wholesaler by any means to participate in or contribute to any local or national advertising fund controlled directly or indirectly by a supplier.

(i) Fail to provide each wholesaler of the supplier's brand or brands with a written agreement which contains in total the supplier's agreement with each wholesaler, and designates a specific sales territory.

(j) Fix, maintain, or establish the price at which a wholesaler shall sell any wine.

(k) Take any retaliatory action against a wholesaler that files a complaint regarding an alleged violation by the supplier of state or federal law or an administrative rule.

(l) Require or prohibit any change in the manager or successor manager of any wholesaler who has been approved by the supplier as of June 26, 1984. Should, after June 26, 1984, a supplier require that a manager or successor manager be appointed, or should a wholesaler change an approved manager or successor manager, a supplier shall not interfere with or prohibit the appointment unless the person fails to meet the reasonable written standards for Michigan wholesalers of the supplier which standards have been provided to the wholesaler.

(m) Require by a provision of any agreement or other instrument in connection with the agreement that any dispute arising out of or in connection with that agreement be determined through the application of any other state's laws. Any supplier or wholesaler aggrieved by any dispute arising out of or in connection with an agreement governed by this act shall have the right to file an appropriate action consistent with this act in any court in this state having venue.

(4) A wholesaler shall not sell or deliver wine to a retail licensee located outside the sales territory designated by the supplier of a particular brand or brands of wine. However, during periods of temporary service interruptions impacting a particular sales territory, a wholesaler who normally services the impacted sales territory shall file with the commission a written notice designating the specific wholesaler or wholesalers who will service the sales territory during the period of temporary service interruption and the approximate length of time of the service interruption. When the temporary service interruption is over, the wholesaler who normally services the sales territory shall notify in writing the commission and the wholesaler, or wholesalers, which is servicing the sales territory on a temporary basis of this fact and any wholesaler servicing the sales territory on a temporary basis shall cease servicing the sales territory upon receipt of the notice.

A wholesaler who is designated to service the impacted sales territory during the period of temporary service shall not be in violation of this subsection.

A wholesaler who has been designated to service the impacted sales territory during the period of temporary service interruption shall not have any of the rights provided under subsections (6) to (12).

(5) A supplier or wholesaler shall not restrict or inhibit, directly or indirectly, the right of free association among suppliers or wholesalers for any lawful purpose.

(6) Notwithstanding the terms, provisions, or conditions of any agreement, a supplier shall not amend any agreement unless the supplier is acting in good faith in making the amendment.

(7) Notwithstanding any agreement and except as otherwise provided for in this section, a supplier shall not cause a wholesaler to resign from an agreement; or cancel, terminate, fail to renew, or refuse to continue under an agreement unless the supplier has complied with all of the following:

(a) Has satisfied the applicable notice requirements of subsection (10).

(b) Has acted in good faith.

(c) Has good cause for the cancellation, termination, nonrenewal, discontinuance or forced resignation.

(8) Notwithstanding any agreement, good cause shall exist for the purposes of a termination, cancellation, nonrenewal, or discontinuance under subsection (7)(c) when all of the following occur:

(a) There is a failure by the wholesaler to comply with a provision of the agreement which is both reasonable and of material significance to the business relationship between the wholesaler and the supplier.

(b) The supplier first acquired knowledge of the failure described in subdivision (a) not more than 2 years before the date notification was given pursuant to subsection (7).

(c) The wholesaler was given written notice by the supplier of failure to comply with the agreement.

(d) The wholesaler was afforded a reasonable opportunity to assert good faith efforts to comply with the agreement within the time limits as provided for in subdivision (e).

(e) The wholesaler has been afforded 25 days in which to submit a plan of corrective action to comply with the

agreement and an additional 75 days to cure such noncompliance in accordance with the plan.

(9) A supplier or wholesaler who terminates, cancels, nonrenews, or discontinues an agreement shall have the burden of showing that it has acted in good faith, complied with the applicable notice requirements under this section, and that there was good cause for the termination, cancellation, nonrenewal, or discontinuance.

(10) Notwithstanding any agreement and except as otherwise provided in this section, the supplier shall furnish written notice of the termination, cancellation, nonrenewal, or discontinuance of an agreement to the wholesaler not less than 15 days before the effective date of the termination, cancellation, nonrenewal, or discontinuance. The notice shall be by certified mail and shall contain all of the following:

(a) A statement of intention to terminate, cancel, not renew, or discontinue the agreement.

(b) A statement of the reason for the termination, cancellation, nonrenewal, or discontinuance.

(c) The date on which the termination, cancellation. nonrenewal. or discontinuance takes effect.

(11) Notwithstanding subsections (7) and (10), a supplier may immediately terminate, cancel, fail to renew, or discontinue an agreement upon written notice given in the manner and containing the information required by subsection (10) if any of the following occur:

(a) Insolvency of the wholesaler, the filing of any petition by or against the wholesaler under any bankruptcy or receivership law, or the dissolution or liquidation of the

wholesaler which materially affects the wholesaler's ability to remain in business.

(b) Revocation of the wholesaler's license by the commission whereby the wholesaler cannot service the wholesaler's sales territory for more than 60 days.

(c) The wholesaler, or an individual who owns more than 10% of the stock of a corporate wholesaler, has been convicted of a felony. As used in this subdivision, "felony" means a felony under the United States code or the Michigan Compiled Laws. However, an existing approved stockholder or stockholders shall have the right to purchase the stock of the offending stockholder prior to the conviction of the offending stockholder, and if the sale is completed prior to conviction, the provisions of this subdivision shall not apply.

(12) Notwithstanding subsections (7), (10), and (11), upon not less than 15 days' prior written notice given in the manner and containing the information required by subsection (10), a supplier may terminate, cancel, fail to renew, or discontinue an agreement if any of the following events occur:

(a) There was fraudulent conduct on the part of the wholesaler in dealings with the supplier.

(b) The wholesaler failed to confine its sales of a brand or brands to the assigned sales territory. This subdivision does not apply if there is a dispute between 2 or more wholesalers as to the boundaries of the assigned territory, and the boundaries cannot be determined by a reading of the description contained in the agreements between the supplier and the wholesalers.

(c) The sale by the wholesaler of any brand or brands sold by the supplier to the wholesaler and known by the wholesaler to be ineligible for sale prior to the actual sale to the retailer.

The supplier shall repurchase the ineligible product from the wholesaler when the ineligibility is caused by the supplier. The supplier must give the wholesaler written notice specifying the ineligible product.

(13) Notwithstanding subsections (7), (10), (11), and (12), a supplier may terminate, cancel, not renew, or discontinue an agreement upon not less than 30 days' prior written notice if the supplier discontinues production or discontinues distribution in this state of all the brands sold by the supplier to the wholesaler. Nothing in this section shall prohibit a supplier upon not less than 30 days' notice to discontinue the distribution of any particular brand or package of wine. This subsection does not prohibit a supplier from conducting test marketing of a new brand of wine or from conducting the test marketing of a brand of wine which is not currently being sold in this state provided that the supplier has notified the commission in writing of its plans to test market. The notice shall describe the market area in which the test shall be conducted; the name or names of the wholesaler or wholesalers who will be selling the wine; the name or names of the brand of wine being tested; and the period of time during which the testing will take place. A market testing period shall not exceed 18 months.

(14) The wholesaler shall devote reasonable efforts and resources to sales and distribution of all the supplier's products which the wholesaler has been granted the right to sell and distribute and shall maintain reasonable sales levels.

(15) A supplier shall not withhold consent to any transfer of a wholesaler's business if the proposed transferee meets the material and reasonable qualifications and standards required by the supplier. A wholesaler shall give the supplier written notice of intent to transfer the wholesaler's business. A supplier shall not unreasonably delay a response to a request for a proposed transfer of a wholesaler's business. However,

a transfer of a wholesaler's business which is not approved by the supplier shall be null and void. A supplier shall not interfere with, or prevent, the transfer of the wholesaler's business if the proposed transferee is a designated member.

(16) A supplier as part of the written agreement required by this section may, subject to the provisions of subsection (3)(l), require a wholesaler to designate a successor manager who shall be subject to prior approval by the supplier. In the event the designated successor manager fails to assume the role of approved manager or for any reason does not continue to manage the wholesaler's business, after assuming that responsibility, then any successor shall be subject to the prior approval of the supplier, subject to the provisions of subsection (3)(1), notwithstanding the transferee's interest as a designated member.

(17) A supplier that has amended, canceled, terminated, or refused to renew any agreement; has caused a wholesaler to resign from an agreement; or has withheld consent to any assignment or transfer of a wholesaler's business, except as provided for in this section, shall pay the wholesaler reasonable compensation for the diminished value of the wholesaler's business or of any ancillary business which has been negatively affected by the act of the supplier, or both. The value of the wholesaler's business or ancillary business shall include, but not be limited to, its goodwill.

(18) Either party may, at any time, determine that mutual agreement on the amount of reasonable compensation cannot be reached. Should such a determination be made, the supplier or the wholesaler shall send written notice to the other party declaring their intention to proceed with arbitration. Arbitration shall proceed only by mutual agreement of both parties.

(19) The matter of determining the amount of compensation under arbitration may, by agreement of the parties, be submitted to a 5-member arbitration panel consisting of 2 representatives selected by the supplier but unassociated with the affected supplier, 2 wholesaler representatives selected by the wholesaler but unassociated with the wholesaler, and an impartial arbitrator.

(20) Not more than 10 days after the notice to enter into arbitration has been sent, each party shall request, in writing, a list of 5 arbitrators from the American arbitration association. Not more than 10 days after the receipt of the list of 5 choices, the wholesaler arbitrators and the supplier arbitrators may strike and disqualify up to 2 names each from the list. Should either party fail to respond within the 10 days or should more than 1 name remain, the American arbitration association shall make the selection of the impartial arbitrator.

(21) Not more than 30 days after the list of arbitrators is received, the wholesaler and supplier shall exchange in writing the names of their respective arbitration panel representatives.

(22) Not more than 30 days after the final selection of the arbitration panel is made, the arbitration panel shall convene to decide the dispute. The panel shall render a decision by majority vote of the participants within 20 days from the conclusion of the arbitration.

(23) The cost of the impartial arbitrator, the stenographer, and the meeting site shall be equally divided between the wholesaler and the supplier. All other costs shall be paid by the party incurring them. The award of the arbitration panel shall be final and binding on the parties.

(24) Should either party fail to abide by the time limitations as prescribed in subsections (20), (21), and (22), or fail or refuse to make the selection of any arbitrators, or fail to participate in the arbitration hearings, the other party shall make the selection of their arbitrators and proceed to arbitration. The party who has failed or refused to comply as prescribed in this subsection shall be considered to be in default. Any party considered to be in default pursuant to this subsection shall have waived any and all rights the party would have had in the arbitration and shall be considered to have consented to the determination of the arbitration panel.

(25) A wholesaler shall not waive any of the rights granted in any provision of this section. Nothing in this section shall be construed to limit or prohibit good faith dispute settlements voluntarily entered into by the parties.

(26) A successor to a supplier that continues in business as a wine maker, an outstate seller of wine, or master distributor shall be bound by all terms and conditions of each agreement of the supplier with a wholesaler licensed in this state that were in effect on the date on which the successor received the distribution rights of the previous supplier.

(27) This section shall apply to agreements in existence on June 26, 1984, as well as agreements entered into or renewed after that date.

(28) If a supplier engages in conduct prohibited under this section, a wholesaler with which the supplier has an agreement may maintain a civil action against the supplier to recover actual damages reasonably incurred as the result of the prohibited conduct. If a wholesaler engages in conduct prohibited under this section, a supplier with which the wholesaler has an agreement may maintain a civil action against the wholesaler to recover actual damages reasonably incurred as the result of the prohibited conduct.

(29) A supplier that violates any provision of this section is liable for all actual damages and all court costs and reasonable attorney fees incurred by a wholesaler as a result of that violation. A wholesaler that violates any provision of this section is liable for all actual damages and all court costs and reasonable attorney fees incurred by the supplier as a result of that violation.

(30) A supplier or wholesaler may bring an action for declaratory judgment for determination of any controversy arising pursuant to this section.

(31) Except as otherwise provided in this section, if a court finds that a supplier has not acted in good faith in effecting the amendment, termination, cancellation, or nonrenewal of any agreement; or has unreasonably withheld its consent to any assignment, transfer, or sale of a wholesaler's business, it may award exemplary damages, as well as actual damages, court costs, and reasonable attorney fees to the wholesaler who has been damaged by the action of the supplier.

(32) Upon proper application to the court, a supplier or wholesaler may obtain injunctive relief against any violation of this section. If the court grants injunctive relief or issues a temporary restraining order, bond shall not be required to be posted.

(33) The procedure for resolving any violation of subsection (3)(a), (b), (c), (e), (f), (h), (i), (j), (k), (l), or (4) shall be the procedure prescribed by this act and the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws. Any other violation of or dispute regarding this section, unless the dispute is resolved pursuant to subsections (18) to (24), shall only be resolved by a civil

action in court as provided in this section and not by the commission.

APPENDIX E

DISTRIBUTOR CONTRACT

THIS AGREEMENT made and entered into this, the 25th day of September, 1985, by and between Jack Daniel Distillery, Lem Motlow, Prop., (a division of Brown-Forman Corporation), with principal offices at 110 21st Avenue, South, Nashville, Tennessee, hereinafter call "COMPANY," and Viviano Wine Importers, Inc. 15100 Second Blvd. of Detroit, Michigan, hereinafter called DISTRIBUTOR;"

WITNESSETH:

WHEREAS, COMPANY is a seller and distributor of wines, and WHEREAS, DISTRIBUTOR warrants it is a licensed distributor of wines in the State of Michigan and holds the necessary federal, state and local permits authorizing it to distribute such beverages within the state, and

WHEREAS, both COMPANY and DISTRIBUTOR desire that DISTRIBUTOR serve as a distributor of COMPANY in the State of Michigan.

NOW, THEREFORE, for and in consideration of the premises and the further agreements herein contained, the parties agree as follows:

1. COMPANY appoints DISTRIBUTOR a distributor of the following listed products of

COMPANY (hereinafter referred to as "COMPANY'S PRODUCTS"):

All Types and Sizes - Korbel Champagnes
Blanc de Blancs; Blanc de Noir; Natural; Brut; Extra Dry; [Set;] Rose

within the following territory in the State of Michigan:

All Counties within State of Michigan

Notwithstanding the foregoing, COMPANY may add, from time to time, in its sole discretion, items of COMPANY'S PRODUCT or withdraw items from COMPANY'S PRODUCTS without obligation to DISTRIBUTOR. COMPANY'S policy is to promote a "family of brands" concept and when possible, COMPANY will adjust items authorized to be sold by DISTRIBUTOR in such a manner as to enhance efficient and profitable sale and promotion of its brands.

2. The territory described herein shall be the area of primary responsibility of DISTRIBUTOR. DISTRIBUTOR shall devote its principal selling, promotional, marketing and distribution efforts to all licensed retailers located within the territory.

3. During the term of this agreement, COMPANY will sell to DISTRIBUTOR and DISTRIBUTOR will but from COMPANY all of COMPANY'S DESIIGNATED PRODUCTS in such quantities as are necessary to fill DISTRIBUTOR'S reqirements to meet the demand therefor in said territory; provided, however, that COMPANY'S PRODUCTS may not always be available to fill all orders and COMPANY shall have the right to allocate to DISTRIBUTOR such proportion of the available

supplies of COMPANY'S PRODUCTS as COMPANY, in its sole discretion, shall determine. DISTRIBUTOR acknowledges that in the normal course of business a 60 - day inventory is to be maintained in order to properly service retail outlets in the territory.

4. DISTRIBUTOR will furnish to COMPANY, in the form requested by it, sales and inventory records showing its sales and closing inventory of COMPANY'S PRODUCTS for the preceding month, which report shall be furnished to COMPANY not later than the 5th woking day of the month following the reporting period. In addition, as requested by COMPANY from time to time, DISTRIBUTOR shall furnish marketing information, such as, distribution surveys, key account information and sales figures, account-sold reports, and similar type information relating to field activities in order for the COMPANY to be fully informed for analysis of the territory.

5. (a) DISTRIBUTOR will use its best efforts to develop the full potential for, and diligently sell, distribute and promote said COMPANY'S PRODUCTS, in all licensed retail outlets in the territory. DISTRIBUTOR will maintain and grow the market share of COMPANY'S PRODUCTS considering the national performance of the individual brands and the general business climate including marketing support by the COMPANY. (b) DISTRIBUTOR will be responsible for proper distribution services for all COMPANY'S PRODUCTS purchased by DISTRIBUTOR. Proper distribution services shall include, but shall not be limited to, requiring its salesmen to personally contact all retailers within the territory normally covered by DISTRIBUTOR at reasonable intervals in an attempt to sell COMPANY'S PRODUCTS, maintaining an

adequately trained sales management team and sales force to properly represent and promote such sales, proper stock rotation so as to maintain product quality, proper shelf and cold box conditions, proper execution of COMPANY'S promotional programs by utilization of point-of-sale, floor, and other display materials, and maintenance of in-stock conditions for COMPANY'S PRODUCTS in each individual store, wherever located, selling COMPANY'S PRODUCTS.

6. The prices at which COMPANY shall sell its products to DISTRIBUTOR and the prices at which DISTRIBUTOR shall buy COMPANY'S PRODUCTS shall be the prices currently in effect at the time of shipment, with the right reserved by COMPANY to change its prices, in its sole discretion, from time to time on fifteen (15) days' written notice, except that any price change brought about by taxation may be accomplished without such notice.

7. Each order submitted by DISTRIBUTOR to COMPANY shall be subject to COMPANY'S acceptance at its home in Nashville, Tennessee. Terms of payments stipulated by COMPANY on each invoice to DISTRIBUTOR shall represent the terms of payment with respect to each individual shipment and shall be of the essence of this contract. The amount and terms of credit extended by COMPANY to DISTRIBUTOR shall be in the sole discretion of COMPANY.

8. DISTRIBUTOR will not resell any of COMPANY'S PRODUCTS at less than minimum wholesale prices prescribed by law or regulation, and will file such minimum resale prices as are prescribed by COMPANY; provided, however, that when applicable law prevails or otherwise modifies such provision, applicable law shall control and DISTRIBUTOR shall not be required to carry out any policies that involve discriminatory prices, discounts,

rebates, free goods or any violation of federal, state or local laws or regulations.

9. All of COMPANY'S PRODUCTS sold and distributed under this contract shall be bottled, packaged and labeled in conformity with applicable federal, state and local laws, rules and regulations, shall be sound and merchantable, and shall meet all standards of quality imposed by federal law and the laws of the state wherein the products are to be distributed.

10. In the event of damage to any of COMPANY'S PRODUCTS rendering the contents unfit for consumption or the containers unsightly or otherwise not of first-class appearance, DISTRIBUTOR shall not sell or permit the same to become the property of any insurer or carrier, nor otherwise dispose thereof except in accordance with prior written instructions of COMPANY.

11. (a) This contract may be cancelled by COMPANY pursuant to the State's franchise protection law. Orders during the time period following notice of termination shall be limited to only what is reasonably necessary to service existing customers. (b) COMPANY will, if requested by DISTRIBUTOR, pick up all merchandise at delivered cost at the effective date of termination. Any goods picked up by COMPANY from DISTRIBUTOR upon termination of this contract by COMPANY under this section shall be at laid-in cost to DISTRIBUTOR, plus any non-refundable gallonage taxes on the goods paid by DISTRIBUTOR, plus freight and cartage, and the DISTRIBUTOR will ship the same at the direction of COMPANY, f.o.b. DISTRIBUTOR'S place of business or such other point as may be designated by COMPANY. Nothing herein contained shall be construed as being in bad faith because COMPANY elects to exercise the provisions of this clause.

12. In the event of cancellation of this agreement by COMPANY as provided in Paragraph 11:

(a) If there has been any voluntary cooperative advertising by DISTRIBUTOR with the written approval of COMPANY, all advertising dollars so spent by DISTRIBUTOR for the twelve (12) months next preceding the date of notice of cancellation shall be refunded to DISTRIBUTOR by COMPANY. Such payment by COMPANY to DISTRIBUTOR shall be in full and complete discharge of any and all rights of each party against the other for any claims arising out of such voluntary cooperative advertising.

(b) When the effective date of cancellation occurs less than ten (10) years from the date DISTRIBUTOR first began handling COMPANY'S PRODUCTS, COMPANY will pay to DISTRIBUTOR an amount equal to one-half of one percent (1/2) of DISTRIBUTOR'S purchases of COMPANY'S PRODUCTS during the two (2) years next preceding the effective date of cancellation.

(c) when the effective date of cancellation occurs ten (10) years or more from the date DISTRIBUTOR first began handling COMPANY'S PRODUCTS, COMPANY will pay to DISTRIBUTOR an amount equal to one-half of one percent (1/2) of DISTRIBUTOR'S purchases of COMPANY'S PRODUCTS during the three (3) years next preceding the effective date of cancellation.

(d) The amounts to be paid under paragraphs (b) and (c) above shall be computed upon COMPANY'S invoice prices. COMPANY'S PRODUCTS in the hands of DISTRIBUTOR on the effective date of cancellation shall not be used in computing the amount to be paid under paragraphs (b) or (c) above.

(e) The payments provided for in paragraphs (b) and (c) above shall be in full and complete discharge of any and all claims, whether statutory or otherwise, of DISTRIBUTOR against COMPANY for cancellation of this contract by COMPANY.

13. All advertising of COMPANY'S PRODUCTS shall be under the supervision and direction of COMPANY, and no advertising shall be conducted by DISTRIBUTOR except with the written approval of COMPANY. Further, DISTRIBUTOR will not sell or otherwise do business under any name or designation containing a trade name or trademark associated with any of COMPANY'S PRODUCTS without COMPANY'S prior written permission.

14. DISTRIBUTOR will promptly notify the COMPANY in writing of any instance of infringement, misuse, or other abuse of the trademarks of the COMPANY'S PRODUCTS, which may come to the notice of DISTRIBUTOR.

15. This agreement is personal in nature and unless it is otherwise agreed in writing, this contract shall not be assignable.

16. This agreement supplants and supersedes any and all oral or written arrangements or agreements, and includes the full understanding between the parties, and can be changed only by written agreement signed by a corporate officer, partner or the owner of each of the parties.

17. All notices and other communications pursuant to or relating to any of the subject matter of this agreement shall be in writing and shall be sent by certified or registered mail to the other party at the following address:

If to COMPANY, at 110 21st Avenue, South, Nashville, Tennessee 37203
If to DISTRIBUTOR, at 15100 Second Blvd., Detroit, Michigan

The effective date of all notices given hereunder shall be measured from the date of amiling such notice.

18. This contract shall be construed according to the laws of Tennessee, except where the context hereof requires other construction.

19. The parties acknowledge that, at the date hereof, neither has any claims for damages, reimbursement of expenses, contractual breaches, nor any claim of any other kind or nature, except for merchandise purchased by DISTRIBUTOR from COMPANY and not yet paid for, and in consideration of the other entering into this agreement any and all such claims, if the same exist, except for merchandise, are hereby fully and forever discharged and released.

20. All the terms and conditions of this contract are continuing ones, and the failure of either party to insist upon full compliance with any provision shall not be construed as a waiver of the party's rights under that provision, nor shall the same affect any other provision of this agreement.

All provisions of this Agreement are meant to conform with the State's laws and regulations concerning contractual obligations between the parties hereto. In the event any provision of this Agreement is in conflict with existing State laws or regulations, that provision will be null and void and the remaining provisions of the Agreement will remain in full force and effect.

IN WITNESS WHEREOF, this Agreement has be executed in duplicate the day and date first above written.

Jack Daniel Distillery, Lem Motlow, Prop.
a division of
Brown-Forman Corporation (COMPANY)

By /S/

Title Area Vice President

Viviano Wine Importers, Inc (DISTRIBUTOR)

By /S/

Title [President]